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No. (1)

In the Supreme Court of the United States

MICHAEL A. COX,
Attorney General of the State of Michigan,
Petitioner,

v

NORTHLAND FAMILY PLANNING, INC.; NORTHLAND FAMILY PLANNING, INC. – WEST; NORTHLAND FAMILY PLANNING CLINIC, INC. – EAST; SUMMIT MEDICAL CENTER, INC.; PLANNED PARENTHOOD OF SOUTH CENTRAL MICHIGAN; STANLEY M. BERRY; TIMOTHY R.B. JOHNSON; KAROLINE S. PUDER; RONALD C. STRICKLER
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In defending the constitutionality of the Michigan statute enacted to prohibit partial-birth abortion, the Michigan Attorney General asked the Court of Appeals and the District Court to certify the question about the statute's proper construction to the Michigan Supreme Court. Where this was a novel matter of State law and Michigan rules of statutory construction provide that a court should give effect to the constitutional applications of a statute – even empowering a court to read in exceptions to ensure the constitutionality of the statute in order to fulfill the Legislature's intent – did the Court of Appeals err in refusing to certify the question and in completely invalidating the Michigan statute?

PARTIES TO THE PROCEEDING

In the District Court for the Eastern District of Michigan, the Michigan Department of Attorney General, Michael A. Cox and the Prosecuting Attorney for Wayne County, Michigan, Kym L. Worthy, were the defendants. The Northland Family Planning Clinic, Inc.; Northland Family Planning Clinic, Inc. – West; Northland Family Planning Clinic, Inc. – East; Summit Medical Center, Inc.; Planned Parenthood of Mid-Michigan Alliance; Planned Parenthood of South Central Michigan; Stanley M. Berry; Timothy R. B. Johnson; Karoline S. Puder; and Ronald C. Strickler were plaintiffs. The organization Standing Together to Oppose Partial-Birth Abortion (STTOP) moved to intervene in the District Court.

In the United States Court of Appeals for the Sixth Circuit in Case No. 05-2417, the Michigan Attorney General Michael A. Cox was the appellant and the appellees were the Northland Family Planning Clinic, Inc.; Northland Family Planning Clinic, Inc. – West; Northland Family Planning Clinic, Inc. – East; Summit Medical Center, Inc.; Planned Parenthood of Mid-Michigan Alliance; Planned Parenthood of South Central Michigan; Stanley M. Berry; Timothy R. B. Johnson; Karoline S. Puder; and Ronald C. Strickler. This appeal was consolidated with Case No. 05-2418, in which STTOP was the appellant and the same parties were the appellees.

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On March 1, 2005, the respondents in this case, comprised of six health care facilities that provide abortion services and four obstetricians who perform abortions, filed a complaint against the Michigan Attorney General, Michael A. Cox, and the Prosecuting Attorney for Wayne County, Michigan, Kym L. Worthy, seeking a permanent injunction against the application of the Legal Birth Definition Act ("the Act"), Michigan Compiled Law (MCL) 333.1081 *et seq* in the United States District Court for the Eastern District of Michigan. This statute was scheduled to take effect on March 30, 2005.

In a decision dated September 12, 2005, the District Court determined that the statute was unconstitutional in four respects: (1) the Act created an undue burden by effectively prohibiting constitutionally-protected abortion procedures, including the dilation and evacuation (D&E) abortion procedure; (2) the Act did not have an adequate exception for the health of the mother; (3) the Act did not have an adequate exception for the life of the mother; and (4) the District Court concluded that the Act was unconstitutionally vague. *Northland v Cox,* 394 FSupp2d 978 (ED MI, 2005). Pet. App. 36a-53a.

The Michigan Attorney General filed an appeal of this decision with the United States Court of Appeals for the Sixth Circuit. On June 4, 2007, the Court of Appeals affirmed the District Court's decision in its holding that the Act created an undue burden on a woman's right to an abortion before viability because it effectively prohibited constitutionally-protected abortion procedures, including the D&E procedure. The Sixth Circuit did not reach the vagueness issue and affirmed the District Court's decision on the health and life exception without reaching the substance of the issues but only because it concluded that the Act created an undue burden. *Northland v Cox,* 487 F3d 323 (CA 6, 2007). Pet. App. 1a-35a.

JURISDICTION

The Court of Appeals decision affirming the District Court's decision was entered on June 4, 2007. This Court's jurisdiction is invoked under 28 USC 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

By court rule, the State of Michigan provides for the certification of questions of Michigan law to its Supreme Court. The Michigan Court Rule (MCR) 7.305(B) allows federal courts to certify questions that are not controlled by other Michigan Supreme Court precedent:

> (B) From Other Courts.
>
> (1) When a federal court, state appellate court, or tribal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Michigan Supreme Court.

The Michigan statute at issue, the Legal Birth Definition Act, is comprised of five sections and is listed in the Appendix. MCL 333.1081 through MCL 333.1085. Pet. App. 70a-72a.

The Court of Appeals ruled based on the Fourteenth Amendment. Under the Fourteenth Amendment, the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT

Introduction

In responding to the constitutional challenge to the Michigan Legal Birth Definition Act, the Michigan Attorney General asked the federal courts to certify the question of the proper construction of the Michigan Legal Birth Definition Act to the Michigan Supreme Court. The complaint was filed in the United States District Court for the Eastern District of Michigan and the State courts have never had an opportunity to examine the statute. The District Court ignored the request, and the Court of Appeals rejected this request by concluding that the statute was not subject to a narrowing construction. But this interpretation was based on an erroneous understanding of the legislative history and on a construction of the statute that failed to give effect to its constitutional applications. The Court of Appeals also never addressed the seminal case of Michigan law, *People v Bricker,*[1] an abortion case, which empowered Michigan courts to salvage Michigan statutory provisions through a narrowing construction or through the act of reading into a statute necessary exceptions.

In other words, the decision of the Court of Appeals failed to accord adequate respect for the State sovereignty of Michigan and the principles of federalism. Michigan jurisprudence is unique in its recognition that it is the "public policy of Michigan to proscribe abortion" and in its construction of its abortion statutes to give them effect. The State courts have rejected any claim that there is a separate right to abortion in Michigan's constitution and the Michigan Supreme Court gave effect to the statute generally prohibiting abortion in Michigan by reading into the statute the necessary exceptions to ensure its constitutionality.

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[1] *People v Bricker*, 389 Mich 524; 208 NW2d 172 (1973).

This Court should revisit the failure of the federal courts in this case to respect the sovereignty of the State of Michigan and give the State courts an opportunity to construe its statutes to ensure that the will of Michigan's people is carried out in a manner consistent with the federal Constitution.

Facts and Proceedings

In 2004, seeking to proscribe a gruesome procedure commonly known as partial-birth abortion, the State of Michigan Legislature passed the Legal Birth Definition Act ("the Act"), Michigan Compiled Law (MCL) 333.1081 *et seq,* which defines when a person shall be considered "legally born" for the purposes of Michigan law. The statute provides that a fetus is legally born when the fetus becomes a "perinate," as "a live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus[.]" The statute requires that the perinate have some indicia of life, e.g., a detectable heartbeat, and that "anatomical part" means "any portion of the anatomy of a human being that has not been severed from the body." Pet. App. 70a-72a. While the Act does not by its own terms ban any type of abortion procedure, the practical effect of the Act on abortion procedures is that any physician who performs an abortion that results in the injury or death of a "perinate" would be subject to criminal prosecution unless excused by the life and health exceptions.

Under Michigan law, MCL 14.28 and MCL 14.30, the Michigan Attorney General is empowered to bind prosecutors and state agencies to his construction of statutes. At the request of a state legislator on behalf of a county prosecutor, the Michigan Attorney General issued a formal opinion, ("Opinion"),[2] which directed prosecutors to follow his construction of the Act in accordance with Michigan law. Pet. App. 54a-69a. Through this Opinion, the Attorney General

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[2] Michigan OAG, 2005, No 7174, April 4, 2005. See http://www.michigan.gov/documents/op7174_121134_7.pdf.

concluded the following: (1) the Act only bans, subject to a life and health exception, partial-birth abortion also known as the dilation and extraction (D&X) procedure); (2) the Act may not be applied to constitutionally protected procedures, such as the dilation and evacuation (D&E) procedure; and (3) local prosecutors must employ the interpretation of the Act as contained in the Opinion. Pet. App. 63a-69a. Further, the Attorney General Opinion affirmed that the immunity provisions contained in the Act comport with the constitutional requirements for a maternal health exception as set forth in *Stenberg v Carhart*.[3]

In 2005, Respondents sued the Michigan Attorney General, claiming that the Act was unconstitutional. In his response, among other arguments, the Michigan Attorney General asked the District Court to certify the issue regarding the proper construction of the statute to the Michigan Supreme Court. The District Court completely ignored the request for certification – not even addressing the request in its opinion – and then the Court declared the entire Act unconstitutional.

In his appeal to the Court of Appeals, the Michigan Attorney General again requested that the Court certify the proper construction of the Act to the Michigan Supreme Court. The Michigan Attorney General argued that the Opinion issued by the Attorney General would serve as a template for the narrowing construction that was mandated under Michigan law, particularly the *People v Bricker* case.[4] The Court of Appeals refused to certify the question, concluding that the Act was not subject to a narrowing construction. In reaching this decision, the Court of Appeals did not even cite the *Bricker* decision.

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[3] *Stenberg v Carhart*, 530 US 914 (2000).

[4] *Bricker*, 389 Mich at 528.

REASONS FOR GRANTING THE PETITION

This petition is ultimately about State sovereignty. Consistent with the principles of federalism, this Court has recognized that the State courts are the ultimate interpreters of State law. And this Court has generally endeavored to respect the separate sovereignty of the States by allowing State courts the first opportunity to examine a question of State law where there has been a constitutional challenge to a statute and the questions presents a novel question of State law. Where an issue is amenable to State resolution and one of the parties to the litigation in federal court has requested certification, the principles of federalism counsel that this request be honored.

The respondents here challenged the constitutionality of the Legal Birth Definition Act, a State law that had never been interpreted by Michigan courts. Consequently, the issue raised a novel question of State law regarding the proper construction of this Act. In refusing to certify this question, the federal courts failed to accord adequate respect for the sovereignty of Michigan by ignoring the special nature of Michigan law regarding the interpretation of its statutes regulating abortion and engaged in a flawed analysis of the legislative history of the Act. The formal opinion issued by the Michigan Attorney General provided a template for how the State courts would have interpreted this Act and given it effect consistent within constitutional limitations.

Michigan statutes embody the will of the People in a sovereign State. In this case, the lower federal courts frustrated the will of Michigan's people by refusing to certify this issue to the Michigan courts. The fact that the Court of Appeals declined to give a narrowing construction of the statute is a reflection of the limited role the federal courts play in giving effect to the constitutional application of the statute, where it involves an understanding of State law and the statute's legislative history. The proper resolution is to reverse the decision of the Court of Appeals and remand the matter to that

court with instructions to certify the question to the Michigan Supreme Court. Alternatively, this Court should certify the question.

I. This Court has previously indicated that where there is a request for certification of a State legal question that presents a novel question of State law involving a constitutional challenge, the ordinary course is for the federal court to certify the issue to the State court. This rule should not be ignored for statutes that limit and regulate abortion.

The principles of federalism are deeply rooted in our judicial system and these principles favor certifying unsettled questions of State law to a State's highest court. This Court has previously suggested that the certification of State law questions is the 'normal' course when the constitutionality of a statute has been placed at issue in federal court, and there is no State interpretation of the statute from a State court[5]:

> In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary? When anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 526 [](1961) (Harlan, J., dissenting) ("*Normally this Court ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts.*"); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 573-574 [](1947)[.]

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[5] *Arizonans For Official English v Arizona*, 520 US 43, 75 (1997)(footnote omitted; emphasis added).

This logically is the normal process because "[f]ederal courts lack competence to rule definitively on the meaning of state legislation."[6]

The process of certification has replaced the process used previously to bring State legal questions into State court through the *Pullman* abstention doctrine.[7] Certification allows a federal court to put a novel question of State law to the State's highest court, which both reflects a judicial economy and pays respect to our federal system by acknowledging the independent sovereignty of the States.[8]

In 2005, in a case in which the parties affirmatively refused the possibility of certification,[9] Justice Stevens issued a dissent in which he still recommended certification.[10] In doing so, he highlighted three justifications for the federal preference of certification[11]:

> [I]t would, in my judgment, be a far wiser course to certify the question to the Colorado Supreme Court. Powerful considerations support certification in this case.
>
> First, principles of federalism and comity favor giving a State's high court the opportunity to answer important questions of state law, particularly when those questions implicate uniquely local matters such as law enforcement

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[6] *Arizonans*, 520 US at 48.
[7] *Arizonans*, 520 US at 75.
[8] *Arizonans*, 520 US at 76.
[9] See *Town of Castle Rock v Gonzales*, 545 US 748, 758 n 5 (2005).
[10] *Castle Rock*, 545 US at 777-778 (Stevens, J., dissenting).
[11] *Castle Rock*, 545 US at 777-778 (Stevens, J., dissenting)(citations omitted, footnotes omitted, and paragraph breaks added). See also *Elkins v Moreno*, 435 US 647, 662 n 16 (1978); *Bellotti v Baird*, 428 US 132, 151 (1976); *Lehman Brothers v Schein*, 416 US 386, 391 (1974).

> and might well require the weighing of policy considerations for their correct resolution.
> Second, by certifying a potentially dispositive state-law issue, the Court would adhere to its wise policy of avoiding the unnecessary adjudication of difficult questions of constitutional law.
>
> Third, certification would promote both judicial economy and fairness to the parties. After all, the Colorado Supreme Court is the ultimate authority on the meaning of Colorado law, and if in later litigation it should disagree with this Court's provisional state-law holding, our efforts will have been wasted and respondent will have been deprived of the opportunity to have her claims heard under the authoritative view of Colorado law. The unique facts of this case only serve to emphasize the importance of employing a procedure that will provide the correct answer to the central question of state law.

This Court has relied on this doctrine to allow State courts to have the first opportunity to review the State issue that is a predicate to the federal question raised in federal court. See, e.g., *Stewart v Smith*,[12] and *Fiore v White*.[13]

In the *Stenberg* decision, however, this Court declined to certify a question of State law regarding the Nebraska partial-birth abortion statute.[14] The Court noted that the Nebraska Attorney General had not sought certification in the lower federal courts; in contrast the Michigan Attorney General has sought certification both in the Eastern District of Michigan and in the Court of Appeals.

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[12] *Stewart v Smith*, 534 US 157, 159-160 (2001).
[13] *Fiore v White*, 528 US 23, 29 (1999).
[14] *Stenberg*, 514 US at 945.

Also, in rejecting this request, the Court in *Stenberg* noted that this Court has not previously held that a federal litigant "must await a state-court construction or the development of an established practice before bringing the federal suit."[15] The Court then determined that certification was not appropriate there because the statute was not "fairly suspectible" to a narrowing construction. The Court of Appeals reached the same result here[16]:

> Because we agree with the district court that the language of the statute here is not subject to a limiting construction, this prerequisite for certification is not met.

But this analysis by the Court of Appeals ignores the special nature of Michigan's statutory construction law under *Bricker,* in which the Michigan Supreme Court has sought to give effect to the constitutional applications and has even "read into" statutes the necessary exception language in order to give them effect to further the will of the Legislature in light of later developments in federal constitutional law.[17] The issue whether the Michigan courts ought to engage in this kind of salvaging of Michigan statutes is a matter of Michigan law, not federal law. And as a matter of comity and federalism, the federal courts should respect the sovereign right of Michigan to do so.

Moreover, in the last two terms, this Court has restated core doctrines of constitutional jurisprudence in cases involving the regulation and limitation of abortion. In *Ayotte v Planned Parenthood,* this Court reasserted that the federal courts should endeavor generally to give effect to the constitutional applications of statute while enjoining the unconstitutional applications in examining the health-exception

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[15] *Stenberg,* 530 US at 945.
[16] *Northland,* 487 F3d at 343.
[17] *Bricker,* 389 Mich at 529-530.

to a New Hampshire statute that required parental notification.[18] The Court conceded in *Ayotte* that this kind of relief was not "contemplate[d]" by the Court in *Stenberg.*[19] In the following term earlier this year, in *Gonzales v Carhart,* this Court distinguished between facial challenges and as-applied challenges for the health exception challenge to the federal ban on the partial-birth abortion procedure, noting that in the circumstances of the case the federal act was open to an applied challenge in the appropriate case.[20] The Court noted that the doctrine of constitutional avoidance, by which the court seeks to "save" a statute from unconstitutionality had in the past "fallen by the wayside when the Court confronted a statute regulating abortion."[21] This Court should follow its certification jurisprudence here in the same way that these cases apply these traditional doctrines.

II. The refusal of the federal courts to certify this novel question of Michigan law regarding the meaning of the Act conflicts with principles of federalism and comity and ignores the special nature of Michigan law regarding statutory construction under *Bricker.*

A. Michigan jurisprudence on statutory construction provides for greater authority of the State courts to ensure the constitutional application of Michigan law.

Before the Act went into effect, the respondents filed this suit challenging the constitutionality of the Act on four grounds: (1) undue burden; (2) inadequate health exception; (3) inadequate life exception; and (4) vagueness. The statute has never been interpreted by a State court. The only State officer that has issued a decision regarding the construction

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[18] *Ayotte v Planned Parenthood,* 546 US 320, 329 (2006).
[19] *Ayotte,* 546 US at 331.
[20] *Gonzales v Carhart,* 127 S Ct 1610, 1639 (2007).
[21] *Gonzales,* 127 S Ct at 1631.

was the Michigan Attorney General who issued an opinion on the construction of the statute on April 4, 2005, using State court principles of construction.

In Michigan, the Attorney General has historically served a quasi-judicial role by providing answers to legal questions submitted by the legislators or other state actors under MCL 14.32, and the State courts have generally interpreted these answers as binding on State agencies in the absence of a court decision on the matter.[22] Moreover, the Attorney General is the chief law enforcement officer in Michigan,[23] and he exercises supervisory authority over county prosecutors under MCL 14.30.

Consistent with this authority, the Attorney General provided an answer regarding the breadth of the application of the Act, in response to a question that was submitted by a legislator on behalf of the Hillsdale County prosecutor. The Attorney General invoked his authority both under MCL 14.32 in answering legal questions and also under MCL 14.30, binding county prosecutors throughout the State of Michigan to his construction of the Act.

In his opinion, the Attorney General construed the Act consistent with *Stenberg* to apply to only the D&X procedure and concluded that there were adequate exceptions for the life and health of the mother. The Attorney General contends that this opinion would serve as a template for the way the Michigan courts would interpret the Act, particularly in light of Michigan law on abortion and on salvaging statutes when there

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[22] See *Traverse City School Dist v Attorney General*, 384 Mich 390, 407; 185 NW2d 9 (1971) (an attorney general opinion "command[s] the allegiance of state agencies"). See also *In re Certified Question From the US District Court for the Eastern District of Michigan; Wayne County v Philip Morris Inc; Attorney General*, 465 Mich 537, 543-548; 638 NW2d 409 (2002)(recognizing the authority of the Attorney General to "bind" counties as a "subordinate" level of government in matters of state interest).

[23] *Fieger v Cox*, 274 Mich App 449, 451; ___ NW2d ___ (2007).

are later constitutional developments that affect the constitutionality of the statutes.

In Michigan, there is no right to abortion found in the Michigan Constitution.[24] To the contrary, the Michigan Supreme Court has noted that "it is the public policy of the state to proscribe abortion."[25] This policy has been subordinated to the requirements of the United States Constitution as construed by this Court.[26]

Specifically, with respect to statutory construction, the seminal case in Michigan is *People v Bricker*.[27] The Michigan Supreme Court examined the Michigan statute generally prohibiting abortion, MCL 750.14, in light of the United States decision in *Roe v Wade*.[28] In reviewing the statute, the Michigan Supreme Court concluded that Michigan courts were bound to construe the State's abortion regulations to conform to constitutional requirements in order to preserve Michigan law[29]:

> We are duty bound under the Michigan Constitution to preserve the laws of this state and to that end to construe them if we can so that they conform to Federal and state constitutional requirements.

In support of this conclusion, the Michigan Court quoted from Justice Thomas Cooley's treatise on Constitutional Limitations, on the point that the court must give effect to the constitutional applications of a statute, separating the unconstitutional

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[24] *Mahaffey v Attorney General*, 222 Mich App 325, 339; 564 NW2d 104 (1997).
[25] *Bricker*, 389 Mich at 529.
[26] *Bricker*, 389 Mich at 529.
[27] *People v Bricker*, 389 Mich 524; 208 NW2d 172 (1973).
[28] *Roe v Wade*, 410 US 113 (1973).
[29] *Bricker*, 389 Mich at 529.

applications, if the court may do so consistent with the Legislature's intent[30]:

> A legislative act may be entirely valid as to some classes of cases, and clearly void as to others.
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> * * *
>
> [T]he unconstitutional law must operate as far as it can, and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the constitution forbids. If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others.

Consequently, in *Bricker*, the Michigan Supreme Court concluded that the Michigan abortion prohibition continued to operate against non-physicians because the unconstitutional applications of the statute against physicians under *Roe* could be separated from the valid applications against non-physicians.

This Court recognized a similar point to the *Bricker* analysis in *Ayotte v Planned Parenthood,* although this Court was examining the issue as one of remedy rather than as one of statutory construction as in *Bricker.*

In *Ayotte,* this Court laid out the controlling federal rules in examining a facial constitutional challenge to the validity of a State statute regulating abortion. In identifying three basic rules, the Court noted that the paramount value was

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[30] *Bricker*, 389 Mich at 530-531, quoting Justice Cooley's Constitutional Limitations, pp 215-216 (5th ed).

to enjoin only the unconstitutional applications, while giving effect to the statute's remaining portion.[31] This Court then went on to explain the three interrelated principles for establishing the proper remedy.

First, the Court stated that a federal court should try not to nullify more of the legislature's work than is necessary because a ruling of unconstitutionality "'frustrates the intent of the elected representatives of the people.'"[32] The Court identified the "normal rule" as one in which a court would only invalidate the constitutionally infirm part of the statute rather than facially invalidate the entire statute.[33] This point is similar to the analysis of Justice Cooley – that generally a statute may be invalid as applied to one set of facts and yet valid as applied to another.[34] Second, the Court held that this first principle is limited because the federal courts should not "rewrite" state law to conform it to constitutional requirements.[35] The concern of this Court for this principle was to avoid the federal courts from invading the legislative domain. Third, this Court indicated that a federal court should ensure that its action in severing an unconstitutional application from the statute is consistent with the statute's legislative intent.[36]

Significantly, even though these principles in *Ayotte* are similar to the analysis in the *Bricker* decision, the State of Michigan provides an additional principle of construction in salvaging the constitutionality of a statute. As written, the Michigan statute examined in *Bricker,* MCL 750.14, prohibited

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[31] *Ayotte*, 546 US at 329 (citations omitted).
[32] *Ayotte*, 546 US at 329, quoting *Regan v Time, Inc.*, 468 US 641, 652 (1984) (plurality opinion).
[33] *Ayotte*, 546 US at 329 (citations, internal quotations, and ellipsis omitted).
[34] *Ayotte*, 546 US at 329.
[35] *Ayotte*, 546 US at 325, citing *Virginia v American Booksellers Assn, Inc*, 484 US 383, 397 (1988). In *Virginia*, the Court determined that rather than reach a decision about whether statute was susceptible to the Attorney General's interpretation, it certified the question to the State Supreme Court.
[36] *Ayotte*, 163 LEd2d at 822.

all abortions, defined as inducing a miscarriage, except those to save the life of the mother.[37] The Michigan Supreme Court went so far as to "read into" the Michigan abortion statute the necessary limitations in light of *Roe v Wade*[38] and *Doe v Bolton*[39] to ensure the constitutional application of the statute[40]:

> [W]e seek to save what we can of the Michigan statutes.
>
> * * *
>
> The Supreme Court now requires other exceptions. They can properly be ***read into*** the statutes to preserve their constitutionality.
>
> * * *
>
> In light of the declared public policy of this state and the changed circumstances resulting from the Federal constitutional doctrine elucidated in *Roe* and *Doe*, we construe § 14 of the penal code to mean that the prohibition of this section shall not apply to "miscarriages" authorized by a pregnant woman's attending physician in the exercise of his medical judgment; the effectuation of the decision to abort is also left to the physician's judgment; *however, a physician may not cause a miscarriage*

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[37] MCL 750.14 provides as follows:

> Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter. In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

[38] *Roe v Wade*, 410 US 113 (1973).

[39] *Doe v Bolton*, 410 US 179 (1973).

[40] *Bricker*, 389 Mich at 529-530 (emphasis added).

> *after viability except where necessary, in his medical judgment, to preserve the life or health of the mother.*

In other words, the Michigan Supreme Court read into the Michigan statute a limitation applying the statute only after viability and then created a health exception for this application where there was none in the statute. This same principle of construction was employed in a different setting to save the constitutionality of a Michigan kidnapping statute.[41]

Thus, the State courts in interpreting the Act would have the obligation under *Bricker* to not only give effect to the constitutional applications, similar to *Ayotte,* but would have the authority to read necessary exceptions into the statute consistent with the legislative intent as a matter of statutory construction to preserve the constitutionality of Michigan's statute.

B. The Michigan courts would construe the Act to apply to only the D&X abortion procedure with the necessary exceptions.

At the time that the Michigan Legislature enacted the Act in 2004, the case law from the United States Supreme Court in *Carhart v Stenberg* was clear that a State could not constitutionally prohibit the dilation and evacuation (D&E)

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[41] *People v Adams,* 389 Mich 222, 230; 205 NW2d 415 (1973):

> We agree with Judge Levin's thoughtful and careful analysis that the sweep of this part of the statute is so broad that it requires the interpolation of the historical concept of asportation to render it constitutional, and it is our duty to do so. Failure to do so would result in denial of due process[.] Where a kidnapping statute does not in terms require asportation or its equivalent, such a requirement *has not infrequently been judicially read into and made a part of the definition of the crime.*" [Citations omitted; emphasis added.]

abortion procedure because it would create an undue burden on a woman's right to an abortion during the second trimester.[42]: Nevertheless, it is clear from the concurrence of Justice O'Connor that a State could prohibit the D&X procedure where there was an adequate exception for the life and health of the mother[43]:

> [A] ban on partial-birth abortion that only proscribed the D&X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view.

Consistent with the affidavits submitted by the plaintiff-physicians in this case who perform abortions, the Court in *Stenberg* had provided a factual description from its record and the medical literature, distinguishing the two abortion procedures from one another.[44] Further, this Court noted in *Stenberg* that the term "partial-birth abortion" is a term "ordinarily associated with the D&X procedure."[45]

Like the Michigan courts, this Court presumes as a matter of statutory construction that State legislatures act in a constitutional manner.[46] The review of the constitutionality of a State statute requires due regard for the fact that the federal courts are examining the judgment of those who have taken an oath to uphold the Constitution.[47]

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[42] *Stenberg*, 530 US at 945-946.

[43] *Stenberg*, 530 US at 951 (O'Connor, J., concurring).

[44] *Stenberg*, 530 US at 925 (D&E abortion procedure), and 928 (D&X abortion procedure), citing American College of Obstetricians and Gynecologists Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997).

[45] *Stenberg*, 530 US at 942.

[46] *Illinois v Krull*, 480 US 340, 351 (1987). For Michigan law in this area, see *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999).

[47] *Rostker v Goldberg*, 453 US 57, 64 (1981).

Consistent with *Stenberg,* the statute at issue here was designed to prohibit partial-birth abortions – the D&X procedure -- alone. In defining "perinate" as when an anatomical part of the human being has passed outside the vaginal introitus, the Act specifically defines this event as occurring during an "expulsion" or "extraction" of the human being from the mother.[48] The definition of "anatomical part," referring to a part that is "not . . . severed from the body,"[49] indicates that the perinate must be intact, which is the defining characteristic of the D&X procedure. The statute provides immunity for physicians for any procedure that harms or kills the "perinate" during "complet[ion] of the delivery," indicating that the statute contemplates actions that harm or kill the perinate during a delivery.[50] The statute expressly identifies the "extraction" of the "perinate," as in dilation and extraction, the formal name of the procedure commonly known as partial-birth abortion.[51]

As explained in *Stenberg*, the D&E procedure requires dismemberment or disarticulation of the fetus and removal of the fetus "piece-by-piece" – there is no intact extraction of the fetus. Thus, it is only during the D&X procedure that a perinate – an intact fetus who is being delivered while alive – is harmed or killed by an act of the physician.

In *Gonzales,* this Court noted that the federal partial-birth abortion ban included the definition of a threshold "anatomical landmark" to define when the partial-birth abortion procedure occurs: "the term 'partial-birth abortion' means an abortion in which the person performing the abortion – '(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of

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[48] MCL 333.1085(d).
[49] MCL 333.1085(a).
[50] MCL 333.1083(2).
[51] MCL 333.1085(d).

breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.'"[52] The Court was clear that the federal ban did not reach the D&E procedure "because the doctor will not have delivered the living fetus to one of the anatomical landmarks or committed an additional overt act that kills the fetus after partial delivery."[53] The Court found the definition of the anatomical landmark to be critical in distinguishing the procedure from the constitutionally-protected D&E procedure[54]:

> The identification of specific anatomical landmarks to which the fetus must be partially delivered also differentiates the Act from the statute at issue in *Stenberg*. § 1531(b)(1)(A) (2000 ed., Supp. IV). The Court in *Stenberg* interpreted "'substantial portion'" of the fetus to include an arm or a leg. 530 U.S., at 939 []. The Act's anatomical landmarks, by contrast, clarify that the removal of a small portion of the fetus is not prohibited. The landmarks also require the fetus to be delivered so that it is partially "outside the body of the mother." § 1531(b)(1)(A). To come within the ambit of the Nebraska statute, on the other hand, a substantial portion of the fetus only had to be delivered into the vagina; no part of the fetus had to be outside the body of the mother before a doctor could face criminal sanctions.

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[52] *Gonzales*, 127 S Ct at 1624, quoting 18 USC 1531 (2000 ed, Supp IV).
[53] *Gonzales*, 127 S Ct at 1629.
[54] *Gonzales*, 127 S Ct at 1630.

In contrast, the Act at issue here does require that the perinate pass outside of body of the mother, because the Act defines perinate to be where an unsevered anatomical part of the child passes beyond the "vaginal introitus." This is a higher threshold than the one the Nebraska statute created, which only required that the child be brought "into the vagina." Moreover, even if the federal courts believe that the Act's threshold is inadequate to distinguish the D&E from the D&X procedure (as the Court of Appeals held here), the Michigan courts would have additional authority under *Bricker* to provide a remedy in order to effectuate the Legislature's intent. The act here would be easier to construe to give effect to its intent than the statute in *Bricker*.[55]

C. The Court of Appeals erred in refusing to certify this question to the Michigan Supreme Court based on its erroneous understanding of the legislative history.

In responding to the litigation in federal court, the Attorney General asked the federal courts to certify the construction of the Act to the Michigan Supreme Court. The Michigan Court Rules provide under MCR 7.305(B) for the certification of questions of law to the Michigan Supreme Court:

> (B) From Other Courts.
>
> (1) When a federal court, state appellate court, or tribal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own

[55] Insofar as the District Court found the Act to be unconstitutional based on its health exception, life exception, and vagueness, these likewise are questions that the Michigan Supreme Court should address under *Bricker*. Like the Attorney General's opinion applying Michigan's rules of statutory construction, the Michigan Supreme Court would give effect to the constitutional applications of the statute consistent with federal constitutional law.

initiative or that of an interested party certify the question to the Michigan Supreme Court.

The District Court ignored this request and did not even cite the fact of the Attorney General's request.

The Court of Appeals also rejected this request, but after first concluding that the Act was unambiguous and that it applied to not only the D&X procedure but also to constitutionally-protected abortion procedures, including the D&E abortion procedure: "Because an anatomical part must be removed to conduct a D&E abortion, it is apparent that the Michigan statute would prohibit D&E, and under the framework of *Stenberg* and *Gonzales*, impose an unconstitutional undue burden."[56] Consequently, according to the Court of Appeals, one of the key features of the federal partial-birth abortion ban that distinguished it from the Nebraska statute was its definition that of the "anatomical landmark."

In contrasting the Michigan statute to the federal one, however, the Court of Appeals refused to certify the question by holding that the Act was not susceptible to a narrowing construction relying on *Stenberg*.[57] In *Stenberg*, this Court had rejected the Nebraska Attorney General's request to certify the issue because "certification of a question (or abstention) is appropriate only were the statute is 'fairly susceptible' to a narrowing construction.[58]

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[56] *Northland*, 487 F3d at 336-337. Additionally, the Court of Appeals concluded that the Act would apply to suction curettage abortions, medical abortions, and induction abortions. This conclusion contradicts the plain language of the Act. Moreover, as noted by the Attorney General Opinion, see OAG, April 4, 2005, p 11, Pet. App. 64a, any application of the statute to these procedures would be voided under *Bricker*.

[57] *Northland*, 487 F3d at 343.

[58] *Stenberg*, 530 US at 945.

But in reaching this conclusion, the Court of Appeals entirely ignored the special nature of Michigan statutory construction law under *Bricker*. The Court of Appeals did not even cite the case in its decision even though the Attorney General specifically relied on the decision in its brief. See Michigan Attorney General's brief, pp 15-16, 53.[59]

This Court has noted that the federal courts should pause before considering the constitutionality of a State statute when there is no interpretation of that statute by the State courts.[60] The certification of novel or unsettled questions of state law to the state's highest court for authoritative answers may save the federal court "time, energy, and resources and help build a cooperative judicial federalism."[61] Most importantly, it honors the role of State courts and the independence of States in interpreting their own statutes.

In *Arizonans*, this Court stated that, when the lower federal courts did not find the Arizona Attorney General's opinion persuasive, they should have certified the question of the interpretation of the Arizona statute to the Arizona Supreme Court, as the Attorney General had requested.[62] The Arizona Supreme Court could have ruled on the proper construction of the statute, and the complexity of the case might have been avoided. This Court cautioned federal courts

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[59] Although the Attorney General noted the authority from *Bricker* to "read into" the statute necessary exceptions, the Attorney General stated that this authority was not implicated in this Act because the Act should be sustained without resort to that authority. See Attorney General's brief, p 16 n 43. Because the Court of Appeals rejected the claim that the statute was subject to a narrowing construction, this authority was then implicated. The Court of Appeals should have considered the enhanced authority of the Michigan courts in construing statutes in answering the Attorney General's request for certification.

[60] *Arizonans for Official English v Arizona*, 520 US 43, 75 (1997).

[61] *Arizonans*, 520 US at 77, quoting *Lehman Brothers v Schein*, 416 US at 391.

[62] *Arizonans*, 520 US at 79-80.

against invalidating a state's law when the state courts have not yet ruled on that law[63]:

> Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court.

These considerations should apply with equal force even where the issue relates to statutes involving limitations on abortion procedures. As Justice Connor noted in her concurrence in *Brockett v Spokane Arcades Inc*, "[s]peculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court."[64]

This analysis applies here. The State courts of Michigan have been prepared in the past to even "read into" a statute the necessary exceptions to give effect to the constitutional applications of a statute where it is consistent with the legislative intent.

The evidence of the failure of the Court of Appeals to understand and apply Michigan law in this arena is highlighted by its erroneous examination of the state legislative history of the statute.

The Court of Appeals concluded that the supporters of the statute were ambiguous when they referred to "partial-birth abortions" because the phrase could characterize either the D&X abortion procedure or the D&E abortion procedure.[65]

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[63] *Arizonans*, 520 US at 79, citing *Rescue Army*, 331 US at 573-574.
[64] *Spokane Arcades Inc.*, 472 US 491, 509 (1985).
[65] *Northland*, 487 F3d at 338.

This point from the Court of Appeals ignores the fact that this Court in *Stenberg* noted that the phrase "partial-birth abortion" is "ordinarily associated with the D&X procedure."[66] Given the presumption that the legislators were familiar with *Stenberg* at the time of the passage of this Act, there is every reason to believe that the supporters were using the term synonymously with the D&X procedure. Consequently, in context, the supporters' references to partial-birth abortion all refer to the D&X procedure alone.

Moreover, a review of the statute's legislative history reveals that the supporters were unambiguous in believing that the D&X procedure was the only procedure targeted by this statute:

> **Journal of the Senate, No. 58, 92nd Legislature, June 9, 2004, p 1065, Senator Cropsey:**
>
> We're talking about a fully formed baby, a human life, coming out of the birth canal, coming fully out of the birth canal, *except for the head.* A breached birth induced that way and then as the child is lying outside of the birth canal with the still in there, the doctor takes his or her forceps *and punctures it into the head of that child.* That child spasmodically throws its arms and legs back and the child's brains are sucked out. Let's call it for what it is. It's an evil procedure. It's the taking of a life of an innocent human baby. That's what we are talking about.[67]

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[66] *Stenberg*, 530 US at 942.

[67] Journal of the Senate, No. 58, 92nd Legislature, June 9, 2004. See http://www.legislature.mi.gov/(he2fgg4540rtyz2sbgsovnqq)/mileg.aspx?page=print&objectname=2004-SJ-06-09-058&queryid=12715697&highlight=legal%20birth%20definition%20act

Senate Fiscal Agency Analysis, SB 395, October 10, 2003, p 6.

[T]he bill [SB 395] effectively would prohibit the practice of partial-birth abortion.

* * *

Partial-birth abortion is a gruesome procedure whereby a nearly full-term fetus is partially delivered and then *killed by means of having its skull crushed or incised before the delivery is completed*. . . . This extreme practice should not be tolerated in a civilized society and violators should be punished appropriately. While the bill does not refer to partial-birth abortion by name, it specifies that a perinate would be considered a legally born person for all purposes under the law.[68]

House Legislative Analysis Section, HB 4603, May 8, 2003, p 3.

By granting protection as soon as a single part of a baby's anatomy clears the vaginal opening, the bills as written clearly apply *only* to the partial-birth abortion procedure; it should not infringe on constitutionally protected abortion rights for early or mid-term abortions, nor interfere with medical procedures used when a woman miscarries. Further, the language in the bills pertaining to the immunity granted to physicians and their delegates also makes it clear that the bills are restricting the prohibition to partial-birth abortions, for, reportedly, *it is the only procedure used to end late-term*

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[68] Senate Fiscal Agency Analysis, SB 395, October 10, 2003, p 6 (emphasis added). See http://www.legislature.mi.gov/(hc2fgg4540rtyz2sbgsovnqq)/mileg.aspx?page=print&objectname=2003-SFA-0395-E&queryid=12715709 & highlight=legal%20birth%20definition%20act.

> *abortions that does so by partially delivering a baby and then killing it before it is fully delivered.* [Emphasis added.]
>
> **House Legislative Analysis Section, HB 4603, May 8, 2003, p 4.**
>
> [C]oncerns about the scope of the bill are unfounded. The sponsor of the House bill publicly stated in his testimony before the House Family and Children Services Committee that the *sole intent of the legislation was to deal with the procedure known as partial-birth abortion.*
>
> * * *
>
> [T]he inclusion of the definition of "anatomical parts" would clearly exclude spontaneous miscarriages and, according to a Lansing-based gynecologist who submitted written testimony on the bills, this definition would also exclude procedures used earlier in pregnancies. [Emphasis added.][69]

Furthermore, the description given by the supporters makes it clear that they were envisioning the breech-position birth in which the unborn child is drawn up to the head in the birth canal at which point the abortion provider would then crush the skull to complete the delivery. The Michigan courts would not have interpreted the legislative history in this skewed fashion to defeat the apparent legislative intent of the statute.

Consistent with these legislators' descriptions of the procedure to be banned in Michigan, this Court in *Gonzales*

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[69] House Legislative Analysis Section, HB 4603, May 8, 2003, pp 3-4. See http://www.legislature.mi.gov/(gqvunwyz0uqfap45345h1yar)/documents/2003-2004/billanalysis/House/pdf/2003-HLA-4603-a.pdf.

noted the difference between the D&X procedure (intact D&E procedure) and the standard D&E procedure:

> The fatal overt act [in the federal ban] must occur after delivery to an anatomical landmark, and it must be something "other than [the] completion of delivery." § 1531(b)(1)(B). This distinction matters because, unlike intact D&E, standard D&E does not involve a delivery followed by a fatal act.

The supporters of the Michigan ban were describing the same dynamic. Additionally, in contrast to Michigan's statute, this Court's analysis in *Gonzales* recognized that the statute in *Stenberg* prohibited conduct that occurred inside the mother, not outside the mother like Michigan's[70]:

> The landmarks [for the federal statute] also require the fetus to be delivered so that it is partially "outside the body of the mother." § 1531(b)(1)(A). To come within the ambit of the Nebraska statute, on the other hand, a substantial portion of the fetus only had to be delivered into the vagina; *no part of the fetus had to be outside the body of the mother before a doctor could face criminal sanctions.*

The analysis of the Court of Appeals is also internally inconsistent. The Court concluded that the Act's language unambiguously applied to the D&E procedure, but then stated that the legislative history is "actually more ambiguous than the statutory language,"[71] which suggests of course that the statutory language itself was ambiguous.

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[70] *Gonzales*, 127 S Ct at 1630.

[71] *Northland*, 487 F3d at 338.

Given the special authority of the State courts in Michigan and nature of the case law, there was every reason for the federal courts here to give the Michigan courts an opportunity to examine the statute and its legislative history to give effect to the constitutional applications of the statute. The fact that the Court of Appeals here refused to do so effectively frustrated the Legislature and will of the Michigan people to prohibit the D&X procedure in Michigan.

The Michigan courts are empowered to read into the statute the necessary language to ensure its constitutional application – if the Michigan courts elect to do so, there would be no reason for the federal courts to complain of the result.[72] This is the prerogative of the State of Michigan as the sovereign of its law. As a matter of federalism and comity, the federal courts should honor this independent authority. This Court should reverse and remand with a direction for the Court of Appeals to certify this issue to the Michigan Supreme Court, or otherwise certify the question to the Michigan Supreme Court itself.

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[72] The *Bricker* case and *Adams* case are binding precedent in Michigan, although respondents might suggest that they are older decisions and that the Michigan Supreme Court would no longer follow them, or would refuse to employ this authority under these circumstances. But this is irrelevant. The decision whether to follow them and to exercise this authority as a matter of statutory construction is a State decision, not a federal one.

CONCLUSION

The Attorney General of Michigan asks this Court to grant certiorari. Alternatively, the Attorney General asks this Court to grant certiorari, reverse the decision of the Court of Appeals, and remand with instructions to certify the question of the meaning and application of the Act to the Michigan Supreme Court. Lastly, in the second alternative, the Attorney General would ask this Court to certify this question to the Michigan Supreme Court.

Respectfully submitted

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Dated: September, 2007

APPENDIX

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0205p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORTHLAND FAMILY PLANNING CLINIC, INC.; NORTHLAND FAMILY PLANNING CLINIC, INC. – WEST; NORTHLAND FAMILY PLANNING CLINIC, INC. - EAST; SUMMIT MEDICAL CENTER, INC.; PLANNED PARENTHOOD OF MID-MICHIGAN ALLIANCE; PLANNED PARENTHOOD OF SOUTH CENTRAL MICHIGAN; STANLEY M. BERRY; TIMOTHY R.B. JOHNSON; KAROLINE S. PUDER; RONALD C. STRICKLER,

Plaintiffs-Appellees,

v.

MICHAEL A. COX, Attorney General of the State of Michigan,

Defendant-Appellant (05-2418),

KIM L. WORTHY, Prosecuting Attorney for Wayne County,

Defendant,

STANDING TOGETHER TO OPPOSE PARTIAL-BIRTH-ABORTION,

Proposed Intervenor-Appellant (05-2417).

Nos. 05-2417/
05-2418

Appeal from the United States District Court
For the Eastern District of Michigan at Detroit
No. 05-70779 – Denise Page Hood

Argued: October 26, 2006

Decided and Filed: June 4, 2007

Before: MARTIN and COOK, Circuit Judges; BUNNING, District Judge. *

* The Honorable David L. Bunning, United States District Judge for the Eastern District of Kentucky, sitting by designation.

COUNSEL

ARGUED: Robert Joseph Muise, THOMAS MORE LAW CENTER, Ann Arbor, Michigan, B. Eric Restuccia, OFFICE OF THE ATTORNEY GENERAL, APPELLATE DIVISION, Lansing, Michigan, for Defendants. Brigitte Amiri, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Plaintiffs. **ON BRIEF:** Robert Joseph Muise, THOMAS MORE LAW CENTER, Ann Arbor, Michigan, B. Eric Restuccia, OFFICE OF THE ATTORNEY GENERAL, APPELLATE DIVISION, Lansing, Michigan, Ronald J. Styka , MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Lansing, Michigan, for Defendants. Brigitte Amiri, S. Talcott Camp, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, Sanford M. Cohen , CENTER FOR REPRODUCTIVE RIGHTS, New York, New York, Michael J. Steinberg, Kary L. Moss, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, Michigan, for Plaintiffs. Denise M. Burke , Mailee R. Smith, AMERICANS UNITED FOR LIFE, Chicago, Illinois, Kurt G. Calia, COVINGTON & BURLING, Washington, D. C., for Amici Curiae.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. The Michigan Attorney General appeals the district court's decision declaring unconstitutional a state law that regulates abortion methods. Because we find that Michigan's law fails to comply with the explicit limitations that the Supreme Court has established for statutes regulating abortion, we agree with the district court's disposition, and affirm.

I.

In 2004, after a proposal by a citizen initiative petition, the Michigan Legislature passed the Legal Birth Definition Act. The purpose of the Act was to prohibit the practice colloquially referred to as partial-birth abortion. The Act does not on its own terms ban any specific type of abortion procedure. Instead it creates a protected legal status for a partially-delivered fetus that it terms a "perinate." Mich. Comp. Laws § 333.1083(1) ("A perinate shall be considered a legally born person for all purposes under the law."). A perinate is defined by the Act as "a live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus until the point of complete expulsion or extraction from the mother's body." Mich. Comp. Laws § 333.1085(d). The Act provides civil and criminal immunity for physicians who perform procedures that result in the injury or death of a perinate where the perinate is "expelled from the mother's body as a result of a spontaneous abortion," as well as in circumstances where:

> in that physician's reasonable medical judgment and in compliance with the applicable standard of practice and care, the procedure was necessary in either of the following circumstances:

> (i) To save the life of the mother and every reasonable effort was made to preserve the life of both the mother and the perinate.
> (ii) To avert an imminent threat to the physical health of the mother, and any harm to the perinate was incidental to [*328] treating the mother and not a known or intended result of the procedure performed. Mich. Comp. Laws § 333.1083. As the state acknowledges, "the practical effect of the [Act] on abortion procedures is that any physician who performs an abortion that results in the injury or death of a 'perinate' would be subject to criminal prosecution unless excused by the life or health exceptions." Appellant's Br. at 6.

The plaintiffs in this case -- six health care facilities and four obstetrician-gynecologists -- filed suit on March 1, 2005, prior to the March 30, 2005 effective date of the Act. They sought declaratory and permanent injunctive relief, and moved simultaneously for a preliminary injunction to prevent enforcement of the Act during the pendency of the litigation. Two weeks after the complaint was filed, the parties stipulated to a Temporary Restraining Order until the district court could rule on the motion for preliminary injunction. The Michigan Attorney General subsequently issued an opinion purporting to limit the scope of the Act. The opinion provides that in light of federal case law, the Act "has the effect of banning, with certain exceptions, those dilation and extraction (D&X) abortion procedures that require the killing of a 'perinate' as defined in the Act. The [Act] does not have the effect of banning the dilation and evacuation (D&E) procedures. " A.G. Op. at 11 (citing *Stenberg v. Carhart*, 530 U.S. 914, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000); *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003)). After the issuance of the Attorney General's opinion, Michigan filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). The state argued that based on the substance of the opinion and the Attorney General's authority to bind the state's district attorneys, the statute could not be said to prohibit

any constitutionally protected methods of abortion, and that the plaintiffs' case was therefore moot.

With the consent of the parties, the district court consolidated the proceedings regarding the motions for preliminary and permanent injunctive relief. It issued an opinion on September 12, 2005 in which it denied the state's motion to dismiss, reasoning that an Attorney General's opinion "does not constitute a ruling on the constitutionality of the Act." *Northland Family Planning Clinic, Inc. v. Cox*, 394 F. Supp. 2d 978, 985 (E.D. Mich. 2005). It also declared the statute unconstitutional because it imposed an undue burden on a woman's right to terminate her pregnancy by prohibiting the D&E procedure, because it failed to adequately protect the health of the woman, and because it was void for vagueness due to its confusing language. *Id.* at 985-89. The district court's order did not provide any injunctive relief, but simply declared the Act unconstitutional. The district court also denied a motion to intervene filed by a group called "Standing Together to Oppose Partial-Birth-Abortion" or "STTOP." See *id.* at 989-90. STTOP is a ballot-question committee of Right to Life of Michigan, Inc., which was formed to promote the passage of the Act.

The Attorney General and STTOP both appeal from the district court's order.

II.

A full understanding of the legal issues presented by this appeal requires some background on the abortion procedures in question. See *Stenberg*, 530 U.S. at 922 ("[O]ur discussion might seem clinically cold or callous to some, perhaps horrifying to others. There is no alternative way, however, to acquaint the reader with the technical distinctions among different abortions methods and related factual matters, upon which the outcome of this case depends.").

During the first trimester, abortions are typically performed by "suction curettage," where the doctor empties the

uterus with suction by dilating the cervix, inserting a plastic tube into the uterus, and using suction to remove the embryo or fetus. Another relevant abortion method that is performed during the first trimester is a "medical abortion," where the physician administers a medicine that both causes the death of the fetus and induces the uterus to contract and expel its contents.

During the second trimester, the increased size of the fetus requires more complex methods for its removal. See *Stenberg*, 530 U.S. at 925. The most common of these methods is called "dilation and evacuation," or "D&E." *Id.* D&E typically involves dilation of the cervix, followed by the extraction of part of the fetus through the cervix. The resistance caused by pulling the extracted portion of the fetus against the cervix causes the fetus to disjoin and die, after which the remaining parts are extracted. Id. A variation on "D&E" is known as "dilation and extraction," or "D&X," or alternatively "intact D&E."[1] The D&X procedure involves evacuating or otherwise compacting the fetus's skull while the head is still in the uterus so that the head will pass easily through the cervix. Where the fetus presents itself head first, the head is emptied and compressed first, after which the entire fetus is removed intact. If the fetus presents itself feet first, in the breech position, it is partially delivered to the point where the physician can access the fetus's head so as to puncture it and remove the contents. See *Taft*, 353 F.3d at 439-40. In some

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[1] In its recent decision which addresses the constitutionality of the Federal Partial-Birth Abortion Ban Act of 2003, the Supreme Court primarily refers to this process as intact D&E. See *Gonzales v. Carhart*, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007). The Court noted that "the medical community has not reached unanimity on the appropriate name for this D&E variation," and that the procedure "has been referred to as 'intact D&E,' 'dilation and extraction' (D&X), and 'intact D&X.'" *Id.* at 1621. It does not appear that the different names incorporate any meaningful difference in the methods used. We will use the term D&X in this opinion, as it is the term utilized primarily by the parties, and, most significantly, is the nomenclature included in the Michigan Attorney General's Opinion. For purposes of this opinion, the term D&X is intended to be synonymous with the term "intact D&E" used by the Supreme Court in Gonzales.

circumstances, D&X is considered by certain medical experts to be safer for the pregnant woman than D&E because it "involves less risk of uterine perforation or cervical laceration because it requires the physician to make fewer passes into the uterus with sharp instruments and reduces the presence of sharp fetal bone fragments that can injure the uterus and cervix," reduces the risk of retained fetal tissue or "free floating fetal head," and takes less time and involves less blood loss, trauma, and exposure to anesthesia. *Stenberg*, 530 U.S. at 953.

Another common second trimester procedure is induction, which appears to operate like a medical abortion occurring later in pregnancy, where a medication causes the uterus to contract and expel the fetus. Induction carries with it "all the potential complications of labor and delivery at term, and therefore, involves more pain, time and expense than D&E," as well as exposing some women to more risks of infection or other complications.[2] Joint App'x at 68, 83 (Hertz Decl., Berry Decl.). The remaining methods of second trimester abortion are hysterectomy, or removal of the uterus (which leaves the woman sterile), and hysterotomy, which is akin to a premature caesarian section. Joint App'x at 83. Both of these methods are obviously much more invasive and dangerous for the woman than D&E, D&X, or induction. *Id.*

The classifications of these particular abortion procedures are important because the Supreme Court and this Court have used them as a reference for which abortion procedures a state can permissibly prohibit under *Planned Parenthood of*

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[2] Classifying these various procedures involves a bit of oversimplification. As the plaintiffs' Declarant Dr. Michael Hertz indicates, physicians can never predict exactly how an abortion will proceed, and sometimes the methods must be modified during the procedure. Joint App'x at 68 (Hertz Decl.). For example, in some medical abortions and some inductions, the fetus will not pass from the uterus as smoothly as hoped, and it will become necessary to use some variation of D&E or D&X to complete the abortion. *Id.* at 66; Joint App'x at 82 (Berry Decl). Our outline focuses on the most common procedures and how they are most often used, as well as the classifications that the Supreme Court applied to them in *Stenberg* and *Gonzales*.

Southeastern Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). See *Gonzales*, 127 S. Ct. at 1620-23; *Stenberg*, 530 U.S. at 920; *Taft*, 353 F.3d at 439-40. *Casey* held that a state may regulate abortion before viability so long as it does not impose an "undue burden" on a woman's right to terminate her pregnancy, and may regulate and even prohibit abortion after viability "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Casey*, 505 U.S. at 879 (citing *Roe v. Wade*, 410 U.S. 113, 164-65, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973)).

Stenberg applied this standard to a Nebraska law regarding procedures that critics labeled "partial-birth abortion." 530 U.S. at 921. The Court held that the undue burden standard simply barred a state from prohibiting "the more commonly used D&E procedure," as doing so would place "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 938 (quoting *Casey*, 505 U.S. at 877). This portion of *Stenberg*'s holding is relatively straightforward: if a statute prohibits pre-viability D&E procedures, it is unconstitutional. See *id.*; see also *Taft*, 353 F.3d at 438. The other aspect of *Stenberg*'s holding allowed a general statutory ban on less common abortion procedures (including D&X), presumably as part of a state's ability to regulate previability abortion methods, but with a caveat: "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, Casey requires the statute to include a health exception when the procedure is 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *Id.* (quoting *Casey*, 505 U.S. at 879). The *Stenberg* Court ruled that such an exception to Nebraska's ban on D&X was necessary, in light of the district court's "highly plausible record-based explanation" of why D&X "obviates health risks in certain circumstances," in light of "a division of opinion among some medical experts," and in the absence of controlled medical studies on the issue. *Stenberg*'s two-part holding, in sum, was that it is an undue burden for a state to prohibit "the more commonly used D&E procedure," and that "a statute that altogether forbids

D&X creates a significant health risk," and is therefore impermissible. *Stenberg*, 530 U.S. at 938.

At the time of the district court's opinion, and during briefing and argument in this case, this precedential framework governed the limitations that Michigan could constitutionally place on abortion procedures. Since that time, however, the Supreme Court issued its decision in *Gonzales v. Carhart*, 127 S. Ct. 1610, 167 L. Ed. 2d 480, in which it upheld as constitutional the federal Partial-Birth Abortion Ban Act of 2003, codified at 18 U.S.C. § 1531. The first relevant portion of *Stenberg*'s undue burden analysis -- that a statute regulating abortion procedures cannot prohibit the D&E procedure without imposing an unconstitutional undue burden -- was left undisturbed in *Gonzales*. *Id.* at 1629-31. In upholding the federal statute, however, Gonzales expanded on *Stenberg* in two ways. First, the Court distinguished *Stenberg* based on critical differences between the language of the Nebraska and federal statutes. Specifically, in *Stenberg*, the Nebraska statute was deemed to prohibit D&E procedures because it prohibited delivering "a substantial portion" of the fetus "for the purpose of performing a procedure" that will kill the fetus. 530 U.S. at 938-39. Because D&E often involved pulling an arm or a leg of a still living fetus past the cervix, this language would include the D&E procedure within its prohibition. *Id.* On the other hand, the federal statute provides what the Court referred to as "anatomical landmarks," which require as a prerequisite to the statutory prohibition that the fetal head or, in the case of a breech presentation, the fetal trunk past the navel must be outside the body of the woman prior to the act that causes the death of the fetus. *Gonzales*, 127 S. Ct. at 1627. Based on these "landmarks," the Court held that the federal statute could not be said to prohibit D&E, which "requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix." *Id.* The federal statute was therefore held constitutional. By distinguishing the federal statute from the Nebraska statute, *Gonzales* did not disrupt *Stenberg*'s holding that prohibition of D&E would amount to an unconstitutional undue burden.

Second, *Gonzales* complicated the meaning of *Stenberg*'s holding regarding the need for a health and life exception. The federal Act prohibiting D&X contains no health exception, see 18 U.S.C. § 1531, raising a possible violation of *Stenberg*. Yet Congress justified this omission from the Act by making its own factual findings in enacting the law. In these findings, it stated that "Congress is not bound to accept the same [district court] factual findings that the Supreme Court was bound to accept in Stenberg under the 'clearly erroneous' standard," and that "overwhelming evidence presented and compiled at extensive congressional hearings . . . demonstrates that a [D&X] abortion is never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed and is outside the standard of medical care." Congressional Findings, PP 5, 8, Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (2003). Despite these congressional findings, all three district courts that addressed the federal ban in the first instance found that D&X was necessary in some circumstances to preserve the woman's health, based on medical evidence that differed from the congressional findings. *Gonzales*, 127 S. Ct. at 1635-37.[3] Faced with these contradictory factual determinations, the Supreme Court endorsed neither in its entirety, stating that "[u]ncritical deference to Congress' factual findings in these cases is inappropriate," and, alternatively, that endorsing the findings of "part of the medical community" was "too exacting a standard to

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[3] The Supreme Court stated that the three district courts "appeared to be in some disagreement on this central factual question." *Id.* at 67. Based on its description of the three district court opinions, however, the disagreement only appears to have involved the extent to which each district court credited factual assertions that differed from those made by Congress. Specifically, two district courts found that D&X was the safest procedure to preserve the woman's health in certain circumstances. *Id.* The third "was more skeptical of the purported health benefits," but nevertheless concluded that a significant body of medical opinion . . . holds that [D&X] has some safety advantages (however hypothetical and unsubstantiated by scientific evidence) over D & E for some women in some circumstances." *Id.* at 68 (quoting *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 479 (S.D.N.Y. 2004)).

impose on the legislative power." *Id.* at 1638. In light of the factual conflict, the Court held that with respect to challenges based on the need for a health exception, facial challenges were inappropriate, but as-applied challenges could be maintained. *Id.*

We now proceed to examine how this precedential framework applies to the Michigan abortion law at issue in this case.

III.

Because the district court in this case appears to have addressed the constitutionality of the Act without crafting any injunctive relief, the issue on appeal involves only a question of law that we review de novo. *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 988 (6th Cir. 2000).

The state focuses its appeal on three issues. First, it contends that the district court's remedy was too broad, and that instead of finding the entire statute unconstitutional, the district court should have enjoined only the unconstitutional applications of the statute and otherwise upheld it, particularly in light of the Attorney General's opinion limiting the scope of the statute. Next, Michigan argues that the district court should have found the case to be moot in light of the Attorney General's opinion, as Plaintiffs could not fear prosecution for violations of any unconstitutional applications of the statute in light of the opinion. Finally, the state claims that the district court should have certified a question regarding the scope of the statute to the Michigan Supreme Court before rendering a decision on its constitutionality. STTOP also appeals the district court's denial of its motion to intervene, both as a matter of right and its request for permissive intervention.

A. Scope and Meaning of the Statute and the Attorney General's Opinion

The district court found that the Act imposed an undue burden by prohibiting the D&E procedure, and failed to contain an adequate exception to protect the woman's health and life. In

challenging both of these determinations, the state contends that the district court did not give adequate deference to the Attorney General's Opinion.

1. Undue Burden Related to D&E

Michigan does not challenge the plaintiffs' claim that it cannot prohibit the use of the D&E abortion method under *Stenberg* and *Taft*. Instead, it argues that "[a]s demonstrated by the Attorney General's Opinion, the Act must be construed to apply to only the dilation and extraction (D&X) procedure with a life and health exception consistent with Taft in order to give effect to the statute's legislative intent." Appellant's Br. at 11. The state neither concedes that on its face, the statute goes too far by prohibiting pre-viability abortion procedures beyond D&X, nor explicitly argues that the statutory language is constitutional as written. Instead it insists that "[a] fair reading of the Michigan statute makes it clear that the [Act] contemplates prohibiting the D&X procedure alone." Appellant's Br. at 23. The gist of this argument would seem to be that the legislature intended to only prohibit D&X, even if it did so somewhat inartfully, and that the statutory language, while inexact, is subject to the narrowing construction expressed in the Attorney General's opinion. The state further argues that the district court failed to adequately consider the applicable rules of statutory construction and the Act's legislative history, and failed to adequately defer to the Michigan Attorney General's view of the law in ruling that it reached beyond the D&X procedure and was therefore unconstitutional.

Michigan largely relies on the Supreme Court's decision in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006), in which the Court addressed a New Hampshire law that prohibited a physician from performing an abortion on a minor until 48 hours after written notice of the pending abortion was sent to the minor's parents. Although the statute in *Ayotte* provided exceptions for instances when the woman's health was at risk, the lower federal courts had determined that the provision was

insufficient to adequately address such health concerns, and that the parental notification law should be enjoined entirely. *Id.* at 325-26. The Supreme Court addressed only the remedy, determining that it was too broad and that only the unconstitutional portions of the statute should have been enjoined. *Id.* at 326.

The *Ayotte* court addressed "three interrelated principles [that] inform our approach to remedies." *Id.* at 329. First, the Court seeks to avoid "nullify[ing] more of a legislature's work than is necessary," because doing so "frustrates the intent of the elected representatives of the people." *Id.* For this reason where partial, rather than facial, invalidation is possible, it is the "required course." *Id.* Second, the Court noted that "mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it." *Id.* This consideration counsels in favor of looking to how clearly the court has "already articulated the background constitutional rules at issue and how easily we can articulate the remedy." *Id.* Thus where the Court has established a bright line constitutional rule, it is more appropriate to invalidate parts of the statute that go beyond the constitutional line, whereas "making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a 'far more serious invasion of the legislative domain' than we ought to undertake." *Id.* at 330 (quoting *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 n.26, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995)). Finally, the Court considers legislative intent, and inquires whether the legislature would prefer to have part of the statute remain in force. Id. At the same time, however, the Court is "wary of legislatures who would rely on our intervention," because where states merely cast as wide a net as possible and leave it to the courts to determine the permissible extent of a statute's reach, they run the risk of delegating legislative authority to the judiciary. *Id.* In light of these three considerations, the *Ayotte* Court remanded the case, ordering that "[e]ither an injunction prohibiting unconstitutional applications or a holding

that consistency with legislative intent requires invalidating the statute in toto" was the proper result. *Id.* at 331.

At first blush, there could appear to be some degree of tension between the Supreme Court's command in *Ayotte* that lower federal courts consider partial invalidation of a law's unconstitutional portions before enjoining it in its entirety, and its prior decision in *Stenberg*, in which it upheld the complete invalidation of Nebraska's statute relating to D&E procedures. The Nebraska statute addressed in *Stenberg* generally prohibited what it termed "partial-birth abortion" (with certain health-related exceptions), which it defined as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." 530 U.S. at 922. The statutory definition of "partial delivery" included delivery "into the vagina a living unborn child, or a substantial portion thereof." *Id.* Much like the Michigan Attorney General argues here, the Nebraska Attorney General sought to have the Court uphold the statute based on his narrowing construction, contending that the statutory language of the Nebraska statute differentiated between D&E and D&X. The Court determined that it had to "reject his interpretation, for it conflicts with the statutory language," reasoning that "we are 'without the power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent.'" 530 U.S. at 942, 944 (quoting *Boos v. Barry*, 485 U.S. 312, 330, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988)). As the Court noted, "D&E will often involve a physician pulling a 'substantial portion' of a still living fetus, say an arm or leg, into the vagina prior to the death of the fetus." *Id.* at 939. Thus, the Attorney General's claim that the statute only applied to D&X procedures was simply at odds with the plain language of the statute.

A closer reading of *Ayotte* and *Stenberg* reveals that their remedial approaches are not inconsistent with each other, despite differences between the remedy eventually imposed in each case. First, a substantive distinction between the statutes addressed in the two cases rendered partial invalidation a more natural

approach in *Ayotte* than in *Stenberg*. The *Ayotte* Court concluded that in general, New Hampshire's parental notification requirement was constitutional. 546 U.S. at 326. Under the Court's precedent, however, it was undisputed that the law had to have an exception that would allow abortions without consent from a parent or a judge where they were necessary to protect the life and health of the woman, and the Court found New Hampshire's health exception insufficient. *Id.* at 327-28. Because the unconstitutional portion of the statute (the emergency health exception) was a provision that could be addressed separately from the underlying rule (the parental consent requirement), it was a strong candidate for partial invalidation. In contrast, the underlying rule in Stenberg simply functioned to prohibit D&E procedures. In order to modify this rule to undo the undue burden, a full-blown rewriting of state law would have been required, a course that *Ayotte* itself cautions against.

The *Ayotte* Court also distinguished *Stenberg* 's remedy by noting that "the parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn." *Id.* at 331. Interestingly, however, although the parties in *Stenberg* did not seek severance or partial invalidation, the Nebraska Attorney General did seek to have the Court adopt his narrowing interpretation. The Court expressly declined this request, noting that "we are aware that adopting the Attorney General's interpretation might avoid the constitutional problem discussed in this section. But we are 'without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent.'" 530 U.S. at 944 (quoting *Boos*, 485 U.S. at 330). These statements in the two cases indicate that there is a meaningful distinction between partially invalidating or severing a statute (the course preferred under *Ayotte*), and adopting a narrowing construction (the course rejected in *Stenberg* and requested here by the Michigan Attorney General). It may well be that a strained narrowing construction has more potential to amount to judicial rewriting of the statute than does partial invalidation, even though the two appear to be closely related. Although Michigan conflates the two doctrines, we nevertheless agree that if either of these

more limited remedies is available, they would be the preferred course.

The bottom line is that the limited remedy under either constitutional avoidance or partial invalidation must be consistent with the text of the statute, lest the courts usurp the legislative function. See *Ayotte*, 546 U.S. at 330 ("[I]t would certainly be dangerous if the legislature could set a net large enough to catch all the possible offenders, and leave it to the courts to step inside to announce to whom the statute may be applied." (quoting *United States v. Reese*, 92 U.S. 214, 221, 23 L. Ed. 563 (1876)). This point was recently reinforced in Gonzales, where the Court deemed applicable the doctrine of constitutional avoidance without disturbing the doctrine's inapplicability with respect to the Nebraska statute addressed in *Stenberg*. 127 S. Ct. at 1631. The Court specifically "put . . . to rest" what it described as the "antagonistic 'cannon of construction under which in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs.'" *Id.* (quoting *Stenberg*, 530 U.S. at 977 (Kennedy, J. dissenting)). Even so, it affirmed *Stenberg*'s "uncontroversial proposition that the canon of constitutional avoidance does not apply if a statute is not 'genuinely susceptible to two constructions.'" *Id.* (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 238, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998)).

With this background and the preference for a limited remedy in mind, it is apparent that Stenberg largely governs our analysis here, given the striking similarities it shares with this case. Much like the Nebraska statute, the Michigan statute applies as soon as a portion of the fetus passes beyond the vaginal introitus.[4] As the Supreme Court in *Stenberg* and the district court

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[4] There is a slight distinction in that the Nebraska statute applied where a portion of the fetus passed beyond the cervix into the vagina, as opposed to the vaginal introitus. The evidence before the district court indicated that this is not a meaningful distinction, and Michigan does not argue to the contrary. In his declaration, Dr. Michael Hertz explained that in a D&E procedure "[i]t is not unusual that I will pull a fetal part past the vaginal introitus before it is disarticulated from the rest of the fetus. This is particularly so because during a

here both recognized, this necessarily means it applies to D&E procedures. Further, Plaintiffs submitted unrebutted evidence from their declarants that the statute could also apply to the protected suction curretage procedure. Because suction curretage is used more often than D&E, and used earlier in the pregnancy at a time more removed from viability, the potential for a statutory prohibition of some suction curretage procedures would impose even more of an undue burden on a woman's right to terminate her pregnancy than a prohibition of D&E. In fact, the one procedure the statute would appear not to apply to is a D&X procedure where the fetus presents itself headfirst, as that is the one instance where its death is brought about (through evacuation of the skull) before any portion of it passes beyond the cervix or vaginal introitus. Thus, just as in *Stenberg*, the Michigan Attorney General's interpretation of the statute to only apply to D&X procedures and not D&E procedures is entirely at odds with the language of the statute. The statute is "not genuinely susceptible to two constructions," and therefore the canon of constitutional avoidance does little to save it. See *Gonzales*, 127 S. Ct. at 1631. Were we to place our judicial imprimatur on the Attorney General's opinion, we would impermissibly usurp the function of the Michigan legislature.

The reasoning set forth in the Michigan Attorney General's opinion actually reinforces our determination that its narrowing construction is at odds with the language of the statute. The opinion states that "the D&E procedure requires dismemberment or disarticulation of the fetus and removal of the dead fetus 'piece-by-piece' from the woman's uterus -- there is no intact extraction of the fetus," and concludes that as a result "the fetus would never achieve the status of a perinate under the statute." A.G. Op. at 9. This conclusion is based on either a

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D&E, I use a tenaculum to pull the cervix towards the vaginal introitus, which shortens, if not eliminates, the distance between the cervix and vaginal introitus, . . . [which is] crucial -- both in D&E and suction curettage procedures -- to avoid injury due to instrumentation in the uterus." Joint App'x at 67 (Hertz Decl. at 5).

misunderstanding or an inaccurate description of the D&E procedure. *Stenberg* and *Taft* -- and the evidence before the district court in this case -- make clear that D&E involves and even requires removing a portion of the fetus from the uterus before dismemberment. See *Stenberg*, 530 U.S. at 939; Joint App'x at 67 (Hertz Decl.). Under this procedure, the fetus would therefore become a perinate, as part of it will pass the vaginal introitus, and its subsequent demise would subject the physician to criminal liability based on the Michigan statute. As the Court stated in Stenberg, "[t]he relevant question is not whether the legislature wanted to ban D&X; it is whether the law was intended to apply only to D&X. The plain language covers both procedures." 530 U.S. at 939 (emphasis in original). The same reasoning applies here.

The Supreme Court's holding in *Gonzales* is also of little avail to Michigan on this point. *Gonzales* left undisturbed the holding from Stenberg that a prohibition on D&E amounts to an undue burden on a woman's right to terminate her pregnancy. 127 S. Ct. at 1626-27. Although the Court upheld the federal ban, it explicitly distinguished it from the Nebraska ban addressed in Stenberg. Most significantly for present purposes, the "anatomical landmarks" in the federal ban ensured that it did not prohibit standard D&E. The Nebraska statute's reference to a "substantial portion" of the fetus did not lend itself to a similar limitation. When compared to these other two statutes, the Michigan statute, which applies when "any anatomical part" of the fetus passes the vaginal introitus, is easily the most sweeping and the most burdensome of the three. That is, whatever "substantial part" means, it must require the removal of more than "any anatomical part," and both clearly fall short of the "anatomical landmarks" of the federal ban. Because an anatomical part must be removed to conduct a D&E abortion, it is apparent that the Michigan statute would prohibit D&E, and under the framework of *Stenberg* and *Gonzales*, impose an unconstitutional undue burden.

Additionally, as the plaintiffs point out and the district court found, the statute's plain language would also apply to some suction curretage abortions, medical abortions and induction

abortions, because the signs of life identified in the statute, such as a heartbeat, are often present after the fetus or embryo passes beyond the vaginal introitus in such procedures. 394 F. Supp. 2d at 985-86. This fact further supports the conclusion that the statute is unconstitutional, particularly because it would prohibit several of the most common pre-viability abortion methods. As Stenberg instructs us, this effect creates an unconstitutional undue burden in violation of *Casey*. The Act's failure to distinguish between pre- and post-viability abortions only exacerbates this problem. See *Stenberg*, 530 U.S. at 930 ("The fact that Nebraska's law applies both pre- and post-viability aggravates the constitutional problem presented.").

Our decision is also well supported by the Supreme Court's warning to be wary of statutes that set an extremely wide net of prohibited conduct, and leave it to the courts to set the constitutional boundaries. The rationale behind this rule is that such an approach would involve "substitut[ing] the judicial for the legislative department of the government." *Ayotte*, 546 U.S. at 330. This warning is apropos here -- the Michigan legislature appears to have cast a wide net that would prohibit virtually all methods of abortions once a fetal heart beat is detectable, including the constitutionally protected D&E procedure, despite knowing that some of these procedures were constitutionally protected, and perhaps with the intention of prohibiting everything the federal courts will allow. A court order prohibiting the statute from applying beyond the D&X procedure would involve the Court too deeply in the legislative process, as warned against in *Ayotte*. The language the legislature settled upon would in fact allow some D&X procedures while prohibiting most constitutionally protected procedures -- an approach that undermines our ability to narrow or partially invalidate the statute to render it constitutional under both *Stenberg* and *Ayotte*. Ultimately, because any limitation would be entirely at odds with the language of the statute, such an approach would contravene the holding of Stenberg.

In support of its position, Michigan also points to this Court's decision in *Taft*, which upheld an Ohio statute prohibiting

partial birth abortion. A reading of the statute at issue in *Taft* presents a clear distinction from the Michigan statute. The statute in *Taft* explicitly stated that "[t]his section does not prohibit the suction curretage procedure of abortion, the suction aspiration procedure of abortion, or the dilation and evacuation procedure of abortion." 353 F.3d at 452 (citing Ohio Rev. Code Ann. § 2919.15.1(f)) (emphasis in *Taft*). Although the statute did not itself define "dilation and evacuation," this Court was not troubled by the omission, as it concluded that the meaning of the term was commonly known. See *id.* at 452-53. The Michigan statute contains no similar exception or clear definitions that would avoid sweeping up protected abortion procedures within its prohibition, and thus *Taft* is of no help to the state here.

The state also points to the legislative history of the Act to support its claim that it was intended to prohibit only D&X, and not D&E. This argument is flawed at the outset, however, given the unambiguous language of the statute, which applies any time a portion of the fetus passes the vaginal introitus, rendering it unnecessary to rely upon the legislative history here. See *Sherwin-Williams Co. v. United States*, 403 F.3d 793, 797 (6th Cir. 2005) ("Because the relevant Code provisions are unambiguous, . . . there is no need to consult legislative history."). Additionally, the substance of the legislative history is actually more ambiguous than the statutory language. In the statements cited by Michigan, most of the state legislators refer to "partial-birth abortion" without distinguishing between D&X and D&E. See Appellant's Br. at 25-26. In fact, the term could be read to apply to either method, as D&E involves the partial delivery of a portion of the fetus which the physician subsequently pulls on to bring about dismemberment.[5] Although some of the legislators'

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[5] In Gonzales, the Court read the term "partial-birth abortion" to refer only to D&X, but this interpretation was based on the definition provided in the federal statute. 127 S. Ct. at 1624. In contrast, the Nebraska statute addressed in Stenberg provided the more sweeping definition of "partial-birth abortion" that included D&E, leading to a broader interpretation of it in that case. See 530 U.S. at 922. The term apparently has no established medical definition. See *Gonzales*, 127 S. Ct. at 1641 n.1 (Ginsburg, J., dissenting) ("The term 'partial-birth abortion' is neither recognized in the medical literature nor used

comments reference the collapse of the fetus's head, which is used in D&X, others use language that refers to both procedures. *Id.* at 25 (characterizing the bill as "granting protection as soon as a single part of the baby's anatomy clears the vaginal opening"). The legislative history is of no help to the state, primarily because the text of the statute is unambiguous, but also because the legislative history only creates potential ambiguity. The Supreme Court rejected the legislative history as a source of guidance in Stenberg for similar reasons. 530 U.S. at 943.

The state finally contends that the Attorney General's Opinion should have been granted a greater degree of deference by the district court as a persuasive authority for interpreting Michigan law. This argument is similarly belied by Stenberg. The Court noted that "[t]his Court's case law makes clear that we are not to give the Attorney General's interpretative views controlling weight," adding that "our precedent warns against accepting as 'authoritative' an Attorney General's interpretation of state law when 'the Attorney General does not bind the state courts or local law enforcement agencies.'" 530 U.S. at 940. The parties agree that the Michigan Attorney General cannot bind the state's courts. Although the Attorney General argues that he can bind local prosecutors, this would not appear to be sufficient under *Stenberg*, particularly because, as the plaintiffs point out, an Attorney General's Opinion has no precedential value, and can be revised any time by this or successive Attorneys General. Moreover, as the *Stenberg* Court noted, "even were we to grant the Attorney General's views 'substantial weight,' we still have to reject his interpretation, for it conflicts with the statutory language." 530 U.S. at 942. For the reasons already discussed, the Michigan Attorney General's Opinion also conflicts irreconcilably with the statutory language. Therefore, the district court correctly rejected deferring to the Attorney General's opinion here.

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by physicians who perform second-trimester abortions."). Without some contextual backdrop, comments by legislators that only reference "partial-birth abortion" cannot be more narrowly read to apply only to D&X.

Although federal courts are required to seek to uphold the constitutionality of state statutes where possible so as to refrain from interfering with the democratic functioning of a state's representative government, in this case Michigan passed a statute that clearly went beyond the limitations established by the Supreme Court in *Stenberg* on a nearly identical issue. Further, the statute was passed after this Court's decision in *Taft*, which upheld a significantly narrower Ohio statute in a decision that outlined at length the limitations on a state's ability to regulate abortion procedures under *Stenberg*. See 353 F.3d at 443-53. Michigan therefore had significant guidance in implementing a statute that would ban only the D&X procedure -- the goal that the state now contends it was attempting to achieve -- but instead passed a very broadly-worded statute that showed no meaningful attempt to comply with the constitutional limitations articulated by federal courts in the area of abortion law. We are not in a position to rectify this dragnet approach to legislation, and must affirm the district court's invalidation of the statute based on the undue burden imposed by its general prohibition of many constitutionally protected abortion procedures.

The district court's decision that Michigan's broad abortion statute created an unconstitutional undue burden on a woman's right to terminate her pregnancy because it prohibits D&E was in full accordance with the Supreme Court's guidance in both Stenberg and *Ayotte*, and has in no way been undermined by the interim decision in Gonzales. It is therefore affirmed.

2. Life and Health Exception

The life and health exceptions in the Michigan statute provide as follows:

> (2) A physician or an individual performing an act, task, or function under the delegatory authority of a physician is immune from criminal, civil, or administrative liability for performing any procedure that results in injury or death of a

> perinate while completing the delivery of the perinate under any of the following circumstances:
>
> (a) If the perinate is being expelled from the mother's body as a result of a spontaneous abortion.
>
> (b) If in that physician's reasonable medical judgment and in compliance with the applicable standard of practice and care, the procedure was necessary in either of the following circumstances:
>
> (i) To save the life of the mother and every reasonable effort was made to preserve the life of both the mother and the perinate.
>
> (ii) To avert an imminent threat to the physical health of the mother, and any harm to the perinate was incidental to treating the mother and not a known or intended result of the procedure performed.

Mich. Comp. Laws § 333.1083. The district court found the health exception in part (2)(b)(ii) of the statute inadequate because in every abortion, the physician knows the outcome of the procedure to be the demise of the perinate. 394 F. Supp. 2d at 987. Thus, the district court concluded that the exception is essentially inoperative on its own terms, as it would prohibit every D&E and D&X procedure used to protect the health of the woman, in contravention of the holding in *Stenberg*. Similarly, with regard to the life exception in part (2)(b)(i), the provision that every reasonable effort must be made to save the life of the perinate requires the physician to balance the life of the woman with that of the perinate. The Supreme Court has found life exceptions to be inadequate where they "require the mother to bear an increased medical risk in order to save her viable fetus." *Thornburgh v. American College of Obstetricians &*

Gynecologists, 476 U.S. 747, 769, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986). Because the life exception here does just that, the district court also found it to be unconstitutional. 394 F. Supp. 2d at 987-88.

As discussed above in Part II of this opinion, the Supreme Court's holding in *Stenberg* pertaining to the need for a health exception to otherwise valid D&X prohibitions was modified somewhat in *Gonzales*. It is not immediately apparent how this decision should affect Michigan's statute. On the one hand, *Gonzales*'s holding that an exception allowing D&X might not always be medically necessary was premised on a conflicted factual record, and doubts about the medical need for such an exception would appear to apply with equal force in this case. On the other hand, the factual findings that cast doubt on the safety implications of D&X were not part of the record in this case, were not a basis for the passage of the Michigan statute, and were made by the legislative body of an entirely separate sovereign, suggesting the possibility that they could be of diminished relevance here.

The most straightforward implication of *Gonzales* in this context might be its statement that facial challenges are not the preferred mechanism for challenges pertaining to health exceptions to prohibitions on the D&X procedure, suggesting that such a challenge should not be entertained here. Even so, it is not apparent how and whether *Gonzales* diminishes the rule requiring an exception to protect the woman's life that does not impose upon her an increased medical risk. See *Thornburgh*, 476 U.S. at 769 (prohibiting a "'trade-off' between the woman's health and additional percentage points of fetal survival.'" (citing *Colautti v. Franklin*, 439 U.S. 379, 397-401, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979)). The federal statute contains an apparently adequate life exception that allows D&X where necessary to save the life of the woman, which went unchallenged in *Gonzales*. See 18 U.S.C. § 1531(a) ("This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother."). This suggests that the Supreme Court's precedent pertaining to the life exception remains unchanged.

For purposes of resolving the instant case, we can affirm the district court's decision without addressing the complicated implications of *Gonzales* for the life and health exceptions of the Michigan statute. The bottom line is that the life and health exceptions are exceptions to an unconstitutional and un-fixable general prohibition on certain abortion procedures. That is to say it is unnecessary for us to address exceptions to an unconstitutional and unenforceable general rule. Because we find the general prohibition to be unconstitutional, and we are unable and unsuited to rewriting a prohibition on the D&X procedure alone, there is little to gain by an attempt to resolve this issue.

3. Void for Vagueness

The district court further concluded that the Act was void for vagueness due to its confusing and ambiguous nature. The district court specifically noted that the Act "does not specify what medical procedures are banned and does not set forth specific penalties for violation of its terms." 394 F. Supp. 2d at 989. It also found that "the term 'perinate' is not a commonly used definition within the medical community," and further based its vagueness determination on the failure to define the terms "imminent threat" and "every reasonable effort." *Id.*

A statute is void for vagueness where it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or is so indefinite that it encourages arbitrary and erratic arrests and convictions." *Colautti v. Franklin*, 439 U.S. 379, 390, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979). Due process provides heightened protection against vague statutes "where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Id.*

We believe that the void for vagueness challenge presents a closer question than the undue burden challenges under *Stenberg* discussed above. It would in some ways seem that Plaintiffs' argument that the statutory language is clearly unconstitutional and that the Attorney General's Opinion cannot

be read as a reasonable interpretation cuts against their void for vagueness argument. It does appear that some of the terms in the health and life exceptions are poorly defined, and would fail to notify physicians of exactly when these exceptions would apply, although these shortcomings do not bear upon the separate question of whether the general, prohibited conduct is vague, aside from the exceptions. At any rate, in light of our decision to affirm the district court's decision under *Stenberg*, we decline to reach the separate void for vagueness claim.

B. Mootness

Michigan argues that the plaintiffs' claims became moot after the issuance of the Attorney General's opinion, which interpreted the statute as not applying to constitutionally protected abortion procedures. The state contends that based on the opinion, the plaintiffs no longer have a fear of prosecution for performing constitutionally protected abortions.

We reject the state's mootness argument for several reasons. First, the opinion does not even provide an accurate description of the constitutionally protected D&E procedure, and thus cannot be said to allay fears of prosecution for performing constitutionally protected abortions. The opinion describes D&E as requiring dismemberment within the fetus prior to removal of any of the parts, which would prevent the fetus from ever becoming a perinate. A.G. Op. at 9. This reading is entirely at odds with the evidence before the district court as well as the description of D&E given in Stenberg. Significantly, the Stenberg Court based its holding in part on the evidence that "D&E will often involve a physician pulling a 'substantial portion' of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus." 530 U.S. at 939. Additionally, Hertz explained in his declaration here that "[i]t is not unusual that I will pull a fetal part past the vaginal introitus before it is disarticulated from the rest of the fetus," due to the narrowing of the distance between the cervix and the vaginal introitus that occurs during the procedure. Joint App'x at 67 (Hertz Decl. at 5). This process clearly involves the fetus becoming a perinate, and the physician

would be subject to prosecution for conducting the subsequent abortion. Because even the Attorney General's opinion incorrectly describes the D&E procedure, it would not allay any fear of prosecution that a physician might have when he performs a constitutionally protected D&E abortion where part of the perinate passes the vaginal introitus, because that procedure would not be covered by the opinion. This ambiguity renders the opinion itself vague (wholly independent from the question of whether the statute is vague), as it "conditions potential criminal liability on confusing and ambiguous criteria." *Colautti*, 439 U.S. at 394. As a result, it "presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights." *Id.*

Further, as the plaintiffs point out, the opinion cannot alleviate fear of prosecution because it is not precedential, and the current Attorney General could change it whenever he sees fit, as could any future Attorneys General. The state has also conceded that the Attorney General's opinion is not binding on Michigan courts. Further, the extent to which it binds local prosecutors is at most unclear. On the one hand, the Michigan Supreme Court has stated that "the opinion of the Attorney General that a statute is unconstitutional does not have the force of law and certainly does not compel agreement by a governmental agency." *School Dist. v. Kent County Tax Allocation Bd.*, 415 Mich. 381, 330 N.W.2d 7, 12 (Mich. 1982). On the other hand, a Michigan statute provides that "[t]he Attorney General shall supervise the work of, consult and advise the prosecuting attorneys, in all matters pertaining to the duties of their offices." Mich. Comp. Laws § 14.30. Even if we were to assume that the Attorney General can prevent local prosecutors from enforcing the statute, this is somewhat beside the point, because given the non-binding nature of the opinion on the office of the Attorney General itself, it is insufficient to prevent Plaintiffs from having a fear of future prosecution.[6]

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[6] The state also argues that were any physicians to be prosecuted for performing abortions despite the Attorney General's Opinion, they could claim a defense of entrapment by estoppel, which provides an affirmative defense where a government official has assured a defendant that certain conduct is

Even though "cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties," a party still bears a heavy burden to show that a case is mooted. *Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003);[7] see also *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003) ("The 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness."). In this case, that burden is increased by the fact that the voluntary cessation only appears to have occurred in response to the present litigation, which shows a greater likelihood that it could be resumed. See *Ragsdale v. Turnock*, 841 F.2d 1358, 1366 (7th Cir. 1988) ("We share the district court's concern that the State's position on this provision is asserted only

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legal before the defendant engages in the conduct. As the plaintiffs point out, because entrapment by estoppel is an affirmative defense, it would not prevent them from being prosecuted, but at best would present a barrier to a conviction. This is cold comfort, and the prospect of being prosecuted and forced to litigate an affirmative defense could well impose a significant chilling effect on its own. Moreover, because the Attorney General's Opinion does not accurately define the constitutionally protected D&E procedure, it would not prevent a conviction in a case where a physician performed a D&E that was protected under Stenberg but did not fall within the definition offered by the Attorney General. Such a conviction would violate Stenberg, and thus the defense of entrapment by estoppel does little to advance the state's mootness argument.

[7] In *Ammex Inc. v. Cox*, we rejected a mootness claim based on a Michigan Attorney General's statement that he will not seek to prosecute legally protected activity, stating that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . If it did, the courts would be compelled to leave the defendant . . . free to return to his old ways." 351 F.3d at 704. In *Ammex*, the Attorney General had issued a Notice of Intended Action, indicating that he would seek to prevent alleged false advertising by a duty-free store regarding the application of state taxes. We reversed the district court's decision that the Attorney General's later withdrawal of the Notice made the case moot because "the Attorney General's withdrawal did not make it absolutely clear that the allegedly wrongful conduct could not be reasonably expected to recur." *Id.* at 704. This rationale applies here with equal force. It is not apparent to us how the Notice of Intended Action is different in any way under state law than an Attorney General's opinion, and the state has not argued that it is.

in this litigation."). Although the Attorney General has shown some willingness here to limit the scope of the Act, because he only did so once this lawsuit was filed, and even then did not correctly assess or define the constitutionally protected abortion methods, the state has not met the "heavy burden" of showing that it will not prosecute constitutionally protected abortions under the Act, and we therefore reject the state's mootness argument.

C. Certification to the Michigan Supreme Court

The state's claim that the question of the Act's meaning should be certified to the Michigan Supreme Court is simply contravened by express language in *Stenberg*, a nearly indistinguishable case. There, although the Nebraska Attorney General had not sought certification to the state supreme court in the lower federal courts, the Court stated that certification would still not have been appropriate, as "[c]ertification of a question (or abstention) is appropriate only where the statute is 'fairly susceptible' to a narrowing construction." 530 U.S. at 945.

A prerequisite to certification to a state supreme court is a determination that the statute in question is subject to a narrowing interpretation. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (stating that before a federal court certifies a question to a state supreme court, it must "'first ascertain whether a construction . . . is fairly possible' that will contain the statute within constitutional bounds." (quoting *Ashwander v. TVA*, 297 U.S. 288, 348, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring)). Because we agree with the district court that the language of the statute here is not subject to a limiting construction, this prerequisite for certification is not met. See also *Stenberg* 530 U.S. at 945 ("[W]e have never held that a federal litigant must wait a state-court construction or the development of an established practice before bringing the federal suit."). We therefore reject the state's argument that the district court should have certified the question to the Michigan Supreme Court before rendering its decision.

IV.

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A. STTOP's Motion for Intervention as of Right

We turn now to STTOP's appeal of the denial of its motion for intervention. Rule 24 provides in pertinent part that

> [u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). A proposed intervenor must establish four elements to be entitled to intervene as of right: (1) that the motion to intervene was timely; (2) that the intervenor has a substantial legal interest in the subject matter of the case; (3) that its ability to protect that interest may be impaired in the absence of intervention; and (4) that the parties already before the court may not adequately represent its interest. *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999). The district court found that STTOP did not have an adequate legal interest to intervene given its status as a mere supporter of a single piece of legislation, and that the Attorney General would fully protect its interests. This Court reviews de novo motions to intervene as of right, except for the timeliness element, which is reviewed for abuse of discretion. *Id.* Because the timeliness element is not in dispute here, we review the entire intervention of right issue de novo.

We note at the outset that the significance of STTOP's appeal of the denial of its motion for intervention is somewhat unclear in light of our decision to affirm the summary judgment entered by the district court on the merits. The finality of the summary judgment decision clearly has potential to render moot STTOP's motion to intervene. On the other hand, in light of STTOP's argument that it would have argued the case and

developed the factual record differently than the state, a remand might be necessary to provide STTOP such an opportunity if the motion to intervene was incorrectly denied. In light of this possibility, we will address STTOP's appeal of the denial of its motion for intervention.

STTOP argues that as a public interest group involved in the process leading to the adoption of the challenged statute, it has a legal interest in the subject matter of the lawsuit. It cites to several cases from the Ninth Circuit applying such a rule. Plaintiffs distinguish the cases cited by STTOP by arguing that all of them involved long-standing groups with a broader interest than a single piece of legislation, as opposed to STTOP, which was created and continues to exist only for the purposes of advocating the passage and continued viability of the Act. See *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397-98 (9th Cir. 1995) (allowing conservation group to intervene in suit related to protected status of snail species); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-28 (9th Cir. 1983) (allowing Audobon Society to intervene as of right in suit challenging a birds of prey conservation area); *State of Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980) (allowing National Organization for Women to intervene in suit challenging ratification procedures for Equal Rights Amendment).

We have cited favorably to the Ninth Circuit cases relied on by STTOP in *Michigan State AFL-CIO v. Miller*, for the propositions that "a public interest group that is involved in the process leading to adoption of legislation has a cognizable interest in defending that legislation," and that "rules governing intervention are 'construed broadly in favor of the applicants.'" 103 F.3d 1240, 1245 (6th Cir. 1997). In *Miller*, we allowed the Michigan Chamber of Commerce to intervene as of right in a suit challenging amendments to the state's campaign finance law whose enactment the chamber had supported. We noted that the Chamber's legal interest was supported by four significant factors:

> (1) a vital participant in the political process that resulted in legislative adoption of the 1994 amendments in the first place, (2) a repeat player in Campaign Finance Act litigation, (3) a significant party which is adverse to the challenging union in the political process surrounding Michigan state government's regulation of practical campaign financing, and (4) an entity also regulated by at least three of the four statutory provisions challenged by plaintiffs.

Id. at 1247. In finding that the Chamber had a legal interest, we noted that "the intervention issue raised in this appeal is a close one." *Id.* Here, STTOP might share two of these four factors with the Chamber of Commerce, but clearly does not share the other two. Although STTOP was involved in the process that resulted in the passage of the challenged legislation, and might be adverse to the plaintiffs in the state's regulation of abortion practices, it is not a repeat player in litigation, as it was created for only one specific ballot initiative, and is not itself regulated by any of the statutory provisions at issue here. This fourth factor is particularly significant - unlike the Chamber of Commerce in Miller, STTOP has only an ideological interest in the litigation, and the lawsuit does not involve the regulation of STTOP's conduct in any respect. Thus, STOPP's case for intervention here is much weaker than that of the Chamber of Commerce in *Miller*.

The plaintiffs rely largely on our opinion in *Providence Baptist Church v. Hillandale Comm., Ltd.*, which affirmed the denial of a motion to intervene as of right by a committee that existed to support a local referendum to amend a zoning ordinance. 425 F.3d 309, 316 (6th Cir. 2005). Because the committee's interest lay only in passing the referendum, the Court reasoned that "[a]ny substantial legal interest held by 'the duly authorized committee for a referendum which circulated the referendum petitions' was terminated when the referendum was held and the results certified." *Id.* at 317. Similarly, where STTOP was created and continues to exist for the purpose of passing and upholding the Act, its legal interest can be said to be

limited to the passage of the Act rather than the state's subsequent implementation and enforcement of it.

The rationale behind denying intervention in *Providence Baptist* also points to a useful distinction from the Ninth Circuit cases cited in *Miller* and relied upon here by STTOP -- those cases all involved challenges by a public interest group to the procedure required to pass a particular rule, as opposed to the government's subsequent enforcement of the rule after its enactment. See *id.* ("In contrast to the cases cited by Hillandale Committee in its brief, this case raises no issue as to the validity of the election."); see also *Idaho Farm Bureau*, 58 F.3d at 1397 (involving an underlying suit challenging the process by which a rule was adopted by the Secretary of the Interior); *Sagebrush Rebellion*, 713 F.2d at 526 (same); *Freeman*, 625 F.2d at 886 (underlying suit involved state procedure for ratification of constitutional amendment). We find this distinction to be compelling, as the public at large -- including public interest groups -- has an interest in the procedure by which a given legal requirement is enacted as a matter of democratic legislative process. On the other hand, in a challenge to the constitutionality of an already-enacted statute, as opposed to the process by which it is enacted, the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the legislative process becomes less relevant.

To be sure, public interest groups who are regulated by the new law, or, similarly, whose members are affected by the law, may likely have an ongoing legal interest in its enforcement after it is enacted. See *Grutter*, 188 F.3d at 401 (finding that proposed intervenors, who were applicants to University of Michigan, had a substantial legal interest in the school's admissions process). If the statute in this case regulated STTOP or its members, STTOP would likely have a legal interest, much like the intervenors in *Grutter* who were applicants to the University of Michigan. Alternatively, had STTOP sought to intervene in a suit challenging the legislative process by which the statute was enacted, its legal interest would be significantly stronger due to its involvement in the passage of the Act. After

the Act's passage, however, STTOP's interest in the enforcement of the statute is greatly diminished due to the state's responsibilities in enforcing and defending it as it is written. As things now stand, STTOP's interest in this case simply pertains to the enforceability of the statute in general, which we do not believe to be cognizable as a substantial legal interest sufficient to require intervention as of right.

Without these sorts of limitations on the legal interest required for intervention, Rule 24 would be abused as a mechanism for the over-politicization of the judicial process. Because STTOP lacks a substantial legal interest in the outcome of the case, we affirm the district court's denial of its motion to intervene as of right, and need not address the other elements of intervention.

B. Permissive Intervention

Rule 24(b) provides that

> [u]pon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"The denial of permissive intervention should be reversed only for clear abuse of discretion by the trial judge." *Purnell v. Akron*, 925 F.2d 941, 951 (6th Cir. 1991). Here, the district court explained that it would not allow permissive intervention, reasoning that STTOP and Right to Life of Michigan were "openly hostile to Plaintiffs," and that based on their ideological goals, STTOP's "presence would seriously delay the adjudication and resolution of the matter since other issues would be raised by STTOP." 394 F. Supp. 2d at 990. This conclusion appears to be supported by the record, and is evinced by STTOP's brief here,

which takes an ideological approach to the litigation rather than attempting to argue for the Act's validity under the relevant Supreme Court precedent. The district court also allowed STTOP to file an amicus brief along with two other separate entities. The district court appears to have addressed the relevant criteria required by Rule 24(b), and its denial of permissive intervention cannot be said to have been an abuse of discretion.

V.

We certainly are reluctant to interfere with a statute that represents the will of the elected representatives of the people of Michigan, and do not do so lightly. If, however, the Michigan legislature had sought in good faith to enact a statute that prohibited the abortion procedures it deemed objectionable while complying with the limits imposed by the Constitution, it had plenty of guidance on how to proceed. The Supreme Court's decision in *Stenberg* predates the Michigan statute by five years. Further, in *Taft*, we fully upheld an Ohio statute pertaining to such procedures the year before the Michigan statute was passed. Michigan could have simply copied that statute word-for-word, and been virtually guaranteed a favorable result in the courts of this Circuit. It instead opted to use statutory language that pushed almost every boundary that the Supreme Court has imposed for these types of laws, and which have recently been reaffirmed in *Gonzales*. Because the statute cannot be squared in any way with these limitations, and the Attorney General's opinion is similarly inconsistent with the relevant court decisions and with the statute itself, the district court correctly determined that invalidation is the only available course.

We therefore affirm the district court's entry of summary judgment in favor of Plaintiffs on the basis of its determination that the Act imposes an undue burden on a woman's right to terminate her pregnancy under *Stenberg*. We also affirm the district court's denial of STTOP's motions for intervention.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORTHLAND FAMILY PLANNING CLINIC, INC., *et al.*,
Plaintiffs.

Case No. 05-CV-70779
Honorable Denise Page Hood
United States District Judge

v.

MICHAEL A. COX, Attorney General of the State of Michigan, *et al.*,
Defendants.

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MEMORANDUM OPINION AND ORDER

I. BACKGROUND/FACTS

On March 1, 2005, Plaintiffs Northland Family Planning Clinic, Inc., Northland Family Planning Clinic, Inc.-West, Northland Family Planning Clinic, Inc.-East, Summit Medical Center, Inc., Planned Parenthood Mid-Michigan Alliance, Planned Parenthood of South Central Michigan, Stanley M. Berry, M.D., Timothy R.B. Johnson, M.D., Karoline S. Puder, M.D., and Ronald C. Strickler, M.D., filed the instant class action against Defendants Michael A. Cox, Attorney General of the State of Michigan, and Kym L. Worthy, Prosecuting Attorney for Wayne County, in their official capacities. The Complaint seeks preliminary and permanent injunctive relief and declaratory judgment.

Plaintiffs allege four claims for relief. The first claim is that by prohibiting physicians from performing abortions before the viability of the fetus, the Act has the purpose and effect of imposing an undue burden on women's right to choose abortion in

violation of their right to privacy and liberty guaranteed by the Fourteenth Amendment and 42 U.S.C. § 1983. The second claim is that by prohibiting physicians from performing a range of medical procedures--including virtually all safe and common abortion methods, regardless of the stage of pregnancy--and by limiting the circumstances under which a physician may perform these procedures to preserve the woman's life and health, the Act violates the right to privacy, life, and liberty guaranteed by the Fourteenth Amendment and 42 U.S.C. § 1983. The third claim is that by failing to give adequate notice of the conduct proscribed, and encouraging arbitrary and discriminatory enforcement, the Act is impermissibly vague in violation of the Fourteenth Amendment and 42 U.S.C. § 1983. The fourth claim is that by endangering the health and lives of women, but not men, the Act violates the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

Michigan Public Act 135 of 2004, known as the Legal Birth Definition Act, codified as Michigan Compiled Laws (M.C.L.) §§ 333.1081-333.1085, was proposed by an initiative petition pursuant to Article 2, § 9 of the Michigan Constitution (1963), and passed by the Michigan Legislature in June 2004. M.C.L. § 333.1081; Compiler's Note. The Act was scheduled to take effect on March 30, 2005. The parties entered into a Stipulation agreeing to a Temporary Restraining Order until the Court ruled on the Motion for Preliminary Injunction. (March 14, 2005, Stipulation and Order)

Plaintiffs claim that the Act, M.C.L. § 333.1083(1), defines a "perinate" as a "legally born person for all purposes under the law." (Complaint, ¶24) A "perinate" is defined in M.C.L. § 333.1085(d) as a "live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus [i.e., opening] until the point of complete expulsion or extraction from the mother's body." (Complaint, ¶25). "Live," in M.C.L. § 333.1085(c), is defined as demonstrating one or more of the following: "(i) a detectable heartbeat; (ii) evidence of breathing; (iii) evidence of spontaneous movement; (iv) umbilical cord

pulsation." (Complaint, ¶26) The Act, under M.C.L. § 333.1085(a) defines an "anatomical part" as "any portion of the anatomy of a human being that has not been severed from the body, but not including the umbilical cord or placenta." (Complaint, ¶27) M.C.L. § 333.1084 provides that, "nothing in this act shall abrogate any existing right, privilege or protection under criminal or civil law that applies to an embryo or fetus." (Complaint, ¶28). Plaintiffs claim that the Act applies regardless of the stage of gestation of the pregnancy, regardless of fetal viability, and regardless of whether the embryo or fetus is intact. (Complaint, ¶29)

Plaintiffs further claim that under the Act, M.C.L. § 333.1083(2), a "perinate" is a person with independent legal rights under Michigan law and that any act or omission by a physician that harms a "perinate" gives rise to the same "criminal, civil, or administrative liability" that would attach if the embryo or fetus were in fact a born person. (Complaint ¶30) The Act immunizes physicians from such liability under M.C.L. § 333.1083(2) in three circumstances. The first is where the perinate is being expelled form the mother's body as a result of a spontaneous abortion. The second and third circumstances are, if in the physician's reasonable medical judgment and in compliance with the applicable standard of practice and care, a medical procedure was necessary to save the life of the mother and every reasonable effort was made to preserve the life of both the mother and the perinate, or, to avert an imminent threat to the physical health of the mother and any harm to the perinate was incidental to treating the mother and not a known or intended result of the procedure performed. (Complaint, ¶31) An imminent threat to physical health is defined in the Act, M.C.L. § 333.1085(b) as "a physical condition that if left untreated would result in substantial and irreversible impairment of a major bodily function." (Complaint, ¶32)

Plaintiffs allege that the Act subjects physicians using almost any common method of abortion to a host of severe penalties under Michigan law and it functions as a virtual ban on abortion. (Complaint, ¶33) During the first trimester, abortions

are performed by "suction curettage" where the physician empties the uterus with suction. In the suction curettage procedure, the physician first dilates the cervix, which is the lower part of the uterus that opens into the vaginal canal, inserts a plastic tube into the uterus, then uses a suction to remove the embryo or fetus and other products of conception. During this procedure, Plaintiffs claim some part of the fetus that is still attached to the remainder of the fetus may pass "beyond the plane of the vaginal introitus," while the embryo or fetus has one of the indicia of life enumerated in the Act. (Complaint, ¶37)

In the second trimester, the method used is "dilation and evacuation" or "D&E." The physician dilates the cervix and then uses a combination of suction and forceps to draw the fetus out of the uterus. Sometimes the physician withdraws the fetus from the uterus largely intact. At other times, the physician may bring a part of the fetus through the cervix attached to the rest of the fetus in the uterus, and the counter-resistance of the remainder of the fetus against the cervix causes the fetal part to disjoin. In each of these scenarios, part of the fetus with one of the enumerated indicia of life may be "beyond the plane of the vaginal introitus." The fetus may not be fully extracted when the physician performs the act which results in the death of the fetus. (Complaint, ¶38)

A physician may also perform an abortion using the induction method during the second trimester where the physician induces uterine contractions by administering one of several medicines vaginally, orally, rectally, or into a vein. Sometimes, during this procedure, a part of the fetus with one of the Act's enumerated indicia of life, may emerge "beyond the plane of the vaginal introitus," but the fetus is not completely expelled. The continued delivery of the fetus would result in its demise. When the fetus cannot be completely expelled, variations of the surgical steps described above must be used to complete the abortion, resulting in the demise of the fetus. (Complaint, ¶39)

The suction curettage, D&E and induction abortion methods are used to induce abortion and to treat or complete pregnancy loss. During a pregnancy loss, the embryo or fetus

remains in the uterus, while having one of the Act's enumerated indicia of life, and a physician must employ one of these methods to empty the uterus. (Complaint, ¶40) When performing any of the methods, a physician knows that by the end of the procedure the fetus will die. The physician does not focus on when the fetus dies but ensures the complete evacuation of the uterus as quickly and safely as possible for the woman. (Complaint, ¶42)

Plaintiffs claim that the Act would criminalize certain actions and omissions by a doctor when delivering a fetus at term. For example, if a physician knows the fetus has no chance of survival during the delivery of a fetus with fatal anomalies at term, the physician generally will not take actions to preserve the life of the fetus where such actions would endanger the woman. If the fetus dies at this state, the physician's act would be criminal under the Act. (Complaint, ¶43)

Plaintiffs claim that two abortion methods involving major abdominal surgery, a hysterectomy, which involves the removal of the uterus, and hysterotomy, involving making a surgical incision through the abdominal wall and into the uterus to deliver the fetus, are not criminalized under the Act. These two methods do not entail the passage beyond the plane of the vaginal introitus. Plaintiffs claim these abortion methods are generally unacceptable as abortion methods except in extremely rare circumstances and are far more dangerous to the woman. (Complaint, ¶41)

Plaintiffs assert that the portion of the Act which immunizes physicians from liability for performing a procedure which would harm a perinate, such as a spontaneous abortion or harm to the woman's life or health, are inadequate and are so limited in their applications which would endanger the lives and health of the pregnant women. The exception found in M.C.L. § 33.1083(2)(a)-(b) does not immune from liability those assisting the physician nor the women procuring abortions. (Complaint, ¶4)

Plaintiffs argue the Act fails to give adequate notice to the physicians as to what procedures or actions will subject the physicians to liability. Plaintiffs claim the Act uses terminology which does not describe any particular medical procedure, which leaves physicians to guess as to what procedures or actions are encompassed by the Act. The term "imminent threat to the woman's physical health" is unclear because it could mean that the "threat" must be "imminent" in order for the Act's health exception to apply. Also, the term that a physician make "every reasonable effort" to preserve the life of the perinate when performing a life-saving abortion is impossible to do because it is impossible to preserve the life of an embryo or pre-viable fetus outside the uterus. (Complaint, ¶46)

Plaintiffs further argue that the Act's lack of clarity allows prosecutors to differ widely about what conduct they believe gives rise to liability. Women would be forced to have a hysterectomy or hysterotomy, which places women at significant risk, instead of the other methods of abortion. The treatment of pregnancy loss would be criminalized and women would suffer medical harm for lack of treatment and women would be forced to travel significant distances to obtain a safe abortion elsewhere. (Complaint, ¶¶47-49)

This matter is before the Court on various motions filed by the parties: Plaintiffs' Motion to consolidate Motion for Preliminary Injunction and Trial on the Merits; Plaintiffs' Motion for Preliminary Injunction; Defendants' Motion to Dismiss; and, Motion to Intervene. Responses and replies have been filed by the parties. At the hearing, the parties agreed to consolidate the preliminary injunction hearing with the trial on the merits because only issues of law are before the Court. Fed. R. Civ. P. 65(a)(2). The Court will first address Defendants' Motion to Dismiss before addressing the merits of the case.

II. DEFENDANTS' MOTION TO DISMISS

Rule 12(b)(6) provides for a motion to dismiss for failure to state a claim upon which relief can be granted. This type of

motion tests the legal sufficiency of the plaintiffs Complaint. *Davey v. Tomlinson*, 627 F. Supp. 1458, 1463 (E.D. Mich. 1986). In evaluating the propriety of dismissal underRule 12(b)(6), the factual allegations in the Complaint must be treated as true. *Janan v. Trammell*, 785 F.2d 557, 558 (6th Cir. 1986). If matters outside the pleading are presented in a Rule 12(b)(6) motion, the motion shall be treated as one for summary judgment under Rule 56(b) and disposed of as provided in Rule 56.

Defendants argue that based on the Attorney General's Opinion issued on April 4, 2005, OAG 2005, No. 7174, the Act only applies to the dilation and extraction abortion procedure (D&X), known as partial-birth abortion, and not to constitutionally protected procedures, such as the D&E procedure. Defendants claim that the Attorney General has the authority to direct State and local officials on the proper construction of the Act. The Attorney General's Opinion further affirms the immunity provisions contained in the Act to comport with the constitutional requirements for a maternal health exception as set forth in *Stenberg v. Carhart*, 530 U.S. 914, 938-39, 147 L. Ed. 2d 743, 120 S. Ct. 2597 (2000), followed by the Sixth Circuit in *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436, 445 (6th Cir. 2003). The Sixth Circuit held that partial birth abortions could be banned if the statute provides a medical exception that, based on reasonable medical judgment by a physician, the D&X procedure was necessary to safeguard the mother against significant health risks. *Taft*, 353 F.3d at 445

Plaintiffs respond, stating that the Attorney General's Opinion is not binding on either the state or federal courts. *See Donahoo v. Household Fin. Corp.*, 472 F. Supp. 353, 355 (E.D. Mich. 1979). Plaintiffs argue that courts have rejected attorney general opinions if the interpretation of the state statute was inconsistent with the plain language of the statute or the intent of the legislature. *See, Auto-Owners Ins. Co. v. Budkis*, 227 Mich. App. 45, 575 N.W.2d 79, 81 & n. 1 (Mich. Ct. App. 1997); Reinelt v. Mich. Pub. Sch. Employees' Ret. Bd., 87 Mich. App. 769, 276 N.W.2d 858, 861 (Mich. Ct. App. 1979). In *Stenberg*, Plaintiffs argue that the United States Supreme Court discussed

numerous reasons for rejecting the Nebraska attorney general's interpretation because the opinion was not binding on courts, as is the case in Michigan. *Stenberg*, 530 U.S. at 941. Plaintiffs claim that the Attorney General's opinion rewrote the statute, which the Attorney General has no authority to do.

Based on the Supreme Court's ruling in *Stenberg*, "case law makes clear that we are not to give the Attorney General's interpretative views controlling weight." 530 U.S. at 940.The Attorney General's opinion narrows the Act's application to D&X procedures. Nowhere in the language of the Act does it state that the Legislature intended to limit the Act to D&X procedures only. The Act focuses on the "perinate" and any acts by a physician to endanger the "perinate.

The Attorney General's Opinion does not have the authority of ruling on the constitutionality of a statute. *See Cramer v. Vitale*, 359 F. Supp. 2d 621, 628 (E.D. Mich. 2005) (the role of federal courts is to protect constitutional rights). Even though the Attorney General's Opinion directs the state prosecutors to only apply the statute to D&X procedures, the Opinion does not constitute a ruling on the constitutionality of the Act. The Court cannot accept the Attorney General's opinion as the only interpretation of the Act. The Attorney General's Motion to Dismiss is denied.

III. MERITS OF THE CASE

A. Undue Burden on Right to Reproductive Choice

Plaintiffs state that in *Stenberg* and in *Planned Parenthood v. Casey*, 505 U.S. 833, 846, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992), the Supreme Court reaffirmed the essential holding of *Roe v. Wade*, that the Constitution protects a woman's right to choose to terminate a pre-viable or non-viable pregnancy. Plaintiffs argue that the Act reaches much more than a single abortion procedure because the Act equates "perinate" with a "legally born person" once any non-severed part is beyond the vaginal opening. The Act, therefore, creates a ban on actions at

the heart of abortion procedures from the earliest stages of pregnancy, whether used to perform induced abortions or to treat pregnancy loss.

Plaintiffs submitted the declarations of Michael I. Hertz, M.D., Medical Director of PPSCM, and Stanley M. Berry, M.D., Corporate Chairman of the Department of Obstetrics and Gynecology at William Beaumont Hospital, stating that the Act would ban a physician's ability to perform most abortion procedures based on the definition under the Act. (Hertz Decl., ¶¶11, 34-36; Berry Decl. PP6-7, 16) The Act implicates the suction curettage, D&E, and induction methods of abortion, without regard to whether the embryo or fetus is intact or viable. (Hertz Decl., ¶¶11, 34-36; Berry Decl., ¶¶16-18) The Act would be in direct violation of the Supreme Court precedent in *Stenberg* which noted that a ban on even a single pre-viability abortion procedure can constitute an undue burden on the woman's right to reproductive choice. *Stenberg*, 530 U.S. at 938-46.

Defendants respond that based on the Michigan Attorney General's Opinion, the Act only applies to D&X methods of abortion, which the Sixth Circuit has found to be constitutional. *See Taft*, 353 F.3d at 445.As noted above, the Attorney General's Opinion is not binding on any courts. A reading of the specific language of the Act supports Plaintiffs' arguments in that the Act would ban all pre-viable abortion procedures, including the suction curettage, D&E and induction methods of abortion, which the Supreme Court has found to be safe and that banning such procedures can constitute an undue burden on the woman's right to reproductive choice. *Stenberg*, 530 U.S. at 938-46.

The Act defines a "perinate" as a "live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus [i.e., opening] until the point of complete expulsion or extraction from the mother's body." M.C.L. § 333.1085(d). "Live" is defined as demonstrating one or more of the following: "(i) a detectable heartbeat; (ii) evidence of breathing; (iii) evidence of spontaneous movement; (iv) umbilical cord pulsation. " M.C.L. § 333.1085(c).

An "anatomical part" as "any portion of the anatomy of a human being that has not been severed from the body, but not including the umbilical cord or placenta." M.C.L. § 333.1085(a)

As noted by Dr. Berry in his Declaration, abortion procedures including suction curettage, D&E and induction, entail removal of an embryo or fetus through the woman's vaginal introitus and these procedures are performed to induce abortion and to treat pregnancy loss. (Berry Decl., P6) The embryo or fetus is generally living at the beginning of the procedure and the physician knows that by the end of the procedure the embryo or fetus will have died. (Hertz Decl., ¶29; Berry Decl., ¶14) Generally, the physician's focus is to perform the procedure as safely as possible for the women and ensuring the complete evacuation of the uterus, regardless of which abortion procedure is used. (Hertz Decl., ¶29; Berry Decl., ¶14) In any of these procedures, a non-severed part of the embryo or fetus with a heartbeat may be "beyond the plane of the vaginal introitus" when the physician takes steps to complete the abortion procedure, and that the physician knows the fetus will not survive at the end of the procedure. (Hertz Decl., ¶¶34-36; Berry Decl., ¶¶16-18)

The Act does not describe any specific procedure to be banned. The Act also does not distinguish between induced abortion and pregnancy loss. Based on the language of the Act, Plaintiffs have carried their burden to show that the Act creates an undue burden on a woman's right to choose an abortion.

B. Protection of Women's Health

Plaintiffs claim that because the Act fails to protect women's health, therefore, the Act is unconstitutional on its face. They argue that the importance of maternal health is a unifying thread that runs throughout the Supreme Court's abortion decisions, as noted in the recent case, *Stenberg. Stenberg*, 530 U.S. at 931 ("a State may promote but not endanger a woman's health when it regulates the methods of abortion"). The Sixth Circuit has concluded that a statute regulating abortion requires a maternal health exception that permits the banned procedure

when necessary to prevent a significant health risk. *Taft*, 353 F.3d at 449. Plaintiffs argue that the Act, which purports to create personhood throughout pregnancy and without regard to fetal viability, lacks an operative health exception. Although the Act contains language that exempts a physician from liability to avert an imminent threat to the physical health of the mother, when any harm to the perinate it not a known result, the Declarations submitted by Plaintiffs show that the harm to the embryo or fetus is always a known result--its death. (Hertz Decl., ¶37; Berry Decl., ¶24). Plaintiffs claim the health exception under the Act is entirely meaningless.

Again, Defendants do not specifically address this argument, other than noting that based on the Attorney General's Opinion directing the prosecutors to apply the Act to D&X abortions only. Defendants claim that the Sixth Circuit in *Taft* has held that regulation of D&X abortions is constitutional if the statute provides an exception to preserve the life and health of the mother. *Taft*, 353 F.3d at 445. Defendants argue that the Ohio statute addressed in *Taft* contained a maternal health exception based on "reasonable medical judgment" which the Sixth Circuit found to be constitutional. *Id.* at 445.

The Ohio statute contains a medical health exception allowing D&X procedures based on a reasonable medical judgment of a physician that the mother's health and life are in danger. Ohio Rev. Code Ann. § 2919.15(C). The language in the Michigan statute requires the health exception only when a procedure is necessary to "avert an imminent threat to the physical health of the mother, and any harm to the perinate was incidental to treating the mother and not a known or intended result of the procedure performed." M.C.L. § 333.1083(2)(b)(ii) (emphas is added). This language differs significantly from the Ohio statute found constitutional by the Sixth Circuit. The Ohio statute does not contain language that the physician must consider the fetus' health, whereas the Michigan statute expressly notes that the physician must consider harm to the perinate. The Ohio statute does not contain any language stating that the D&X procedure could not be performed if the physician had knowledge

of the intended harm to the perinate. The Michigan statute expressly notes that the physician may only consider a procedure if there is an "imminent threat" to the mother's health and the harm to the perinate is "not a known or intended result" of the procedure performed. M.C.L. § 333.1083(2)(b)(ii). Plaintiffs argue that physicians always know the outcome of the procedure. They support their argument by submitting the Declarations stating that the harm to the embryo or fetus is always a known or intended result of every abortion. ((Hertz Decl., ¶37; Berry Decl., ¶24).

Plaintiffs have shown that the health exception of the Act is not the same as the language in the Ohio statute found to be constitutional by the Sixth Circuit. Plaintiffs have carried their burden that the health exception provision of the Act is meaningless because physicians always know the intended harm and result of every abortion.

C. Life Exception

Plaintiffs argue that the Act's life exception is also constitutionally inadequate. Defendants claim that the Act is constitutional because the Michigan Attorney General's Opinion specifically applies the Act to D&X procedures only.

The Act insulates physicians from liability if a procedure is "necessary ... to save the life of the mother *and* every reasonable effort was made to preserve the life of both the mother and the perinate." M.C.L. § 333.1083(2)(b)(i). The Declarations submitted by Plaintiffs state that a requirement that a physician attempt to sustain the life of an embryo or pre-viable fetus, which has no chance of survival outside of the uterus, is irrational and further jeopardizes the woman's life. (Hertz Decl.; ¶40; Berry Decl., ¶27) The Supreme Court in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986) stated th at where there no chance of survival outside of the uterus, a requirement that a physician attempt to sustain the life of an embryo or pre-viable fetus is irrational. *Thornburgh*, 476 U.S. at 768-69.The Supreme

Court has also held that the requirement that a physician balance the interests of the woman against the embryo or pre-viable fetus is impermissible. *Id.* at 768. The language in this Act which absolves a physician from liability only if the procedure is "necessary" to save the life of the mother "and" every reasonable effort was made to preserve the life of "both" the mother and the perinate essentially requires the physician to balance the interests of the woman and the "perinate." This requirement is unconstitutional under *Thornburgh*.

Plaintiffs have shown that the life exception under the Act is unconstitutional. Based on *Thornburgh,* the requirement in the Act which requires the physician to balance the interests of the woman against the "perinate" is unconstitutional on its face.

D. Void for Vagueness

Plaintiffs finally argue that the Act is unconstitutionally vague in violation of the Fourteenth Amendment's Due Process Clause b ecause the Act is confusing and ambiguous. Plaintiffs claim that the Act does not specify what medical procedures are banned and fails to set forth specific penalties for violations of its terms. Plaintiffs argue that the Act bans a wide range of medically safe procedures. The Act's definition of the term "perinate" as a legally born person is contradicted by the medical community's understanding of when a fetus is born. Plaintiffs claim that in the medical community, a fetus is not born until it is fully outside of the woman's body. (Berry Decl., ¶20) Plaintiffs also argue that the Act's "health exception" is a nullity and its own terms confusing. The Act's requirement that there must be an "imminent threat" to a woman's physical health is confusing in that the Act does not define what constitutes an imminent threat. (Berry Decl., ¶25) This requires that a physician must wait until medical harm is imminent before their actions would be exempted under the Act. (Hertz Decl., ¶38; Berry Decl., ¶25) The requirement to save a woman's life only if the physician has made every reasonable effort to preserve the life of the perinate is vague because the term "reasonable effort" is not defined and there are no circumstances where an embryo or pre-viable fetus would be able to survive

outside the woman's uterus. (Hertz Decl., ¶40; Berry Decl., ¶¶16, 27)

Defendants rely on their argument that the Michigan Attorney General's Opinion cures any vagueness argument by Plaintiffs.

A statute is unconstitutionally vague and in violation of the Fourteenth Amendment's Due Process Clause i f the statute conditions potential liability on confusing and ambiguous criteria which presents serious problems of notice and discriminatory application. *See Colautti v. Franklin,* 439 U.S. 379, 395, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979). A statute is unconstitutionally vague if it threatens to inhibit the exercise of constitutionally protected rights and subjects individuals to criminal penalties. *Colautti,* 439 U.S. at 391; *Kolender v. Lawson,* 461 U.S. 352, 358 n. 8, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983). Plaintiffs have shown that the Act is vague because it does not specify what medical procedures are banned and does not set forth specific penalties for violations of its terms. Plaintiffs have shown that the definition of the term "perinate" is not a commonly used definition within the medical community. As to the Act's health exception, the language is confusing in that the terms "imminent threat" and "every reasonable effort" (to preserve the life of the perinate) are not defined and require a physician to wait until the woman is in "imminent" danger before performing any medical procedure. As supported by Plaintiffs, there is no circumstance which allows an embryo or a pre-viable fetus to be able to survive outside the woman's uterus.

Plaintiffs have shown that the Act is confusing and vague and does not place the physicians on notice regarding what actions on their part will constitute a violation of the Act. Plaintiffs have carried their burden that the language in the Act is void for vagueness and, therefore, is unconstitutional.

IV. MOTIONS TO INTERVENE

Two parties seek to intervene in this case. The organization called Standing Together To Oppose Partial-birth-abortion ("STTOP") seeks intervention as a defendant in this case unde r Fed.R.Civ.P. 24(a), as a matter of right, or alternatively, under Rule 24(b), for permissive intervention. STTOP is an organization created by the Right to Life of Michigan organization to specifically enact certain legislation opposing abortions. Plaintiffs oppose STTOP's intervention in this case but does not oppose granting STTOP *amici* status. Marty Jo Fleser and Mark Robinson, Chair and Vice-Chair of the Choose Life Caucus of the Michigan Democratic Party, seek to intervene as *amici curiae* only. No opposition has been filed to this motion.

Rule 24 allows intervention as of right or by permission in an "action" before the district court. See Fed.R.Civ.P. 24(a) and (b). Rule 24(a) states:

> Upon timely application, anyone shall be permitted to intervene in an action ... when the applicant claims that the interest relating to the property ... which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter ... impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). Four criteria must be met for intervention as a matter of right: 1) the application is timely; 2) the party must have a substantial legal interest in the case; 3) the party must demonstrate that its ability to protect that interest will be impaired in the absence of intervention; and, 4) there must be inadequate representation of that interest by the current party. See *Michigan State v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). If any of these criteria are not satisfied, a motion to intervene must be denied. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000).

As to the first factor, STTOP's motion was timely since it was filed immediately after the case was filed.

Regarding the second factor, STTOP argues it has expended time, effort and resources to ensure the enactment of the Act and, therefore, it has a vested interest in ensuring the constitutionality of the Act. The Sixth Circuit has limited intervention as of right to membership organizations, longstanding organizations with missions broader than the enactment of a single piece of legislation. *See, County Sec. Agency v. Ohio Dep't of Commerce,* 296 F.3d 477 (6th Cir. 2002). STTOP appears to be a "ballot question committee," not a longstanding organization with a broader mission than to enact a single piece of legislation. STTOP's interest is a generalized interest in one issue. Those supporting a certain legislation, including legislators, have been denied intervention because individual legislators who voted for the enactment of certain legislation do not have standing to challenge the constitutionality of an enacted legislation. *See, Planned Parenthood v. Ehlmann,* 137 F.3d 573, 578 (8th Cir. 1998). Anti-abortion groups are not traditionally permitted to intervene in constitutional challenges to state and local laws regulating abortion. *See, Diamond v. Charles,* 476 U.S. 54, 106 S. Ct. 1697, 1705, 90 L. Ed. 2d 48 (1986). STTOP is unable to meet the second criteria.

Addressing the third and fourth criteria, although STTOP argues that the Attorney General is unable to fully protect their interest, there is no dispute that the Attorney General is charged with defending the interests of Michigan citizens and defending any acts enacted by the legislature. *See, Keith v. Louisiana Dep't of Education,* 93 F.R.D. 820 at 823. The Attorney General in this case has submitted various briefs and has urged the Court to dismiss the matter. STTOP has not shown that the Attorney General is unable to fully protect their interest in the litigation.

Permissive intervention is discretionary underRule 24(b). Plaintiffs have submitted various documents showing that the Right to Life of Michigan is openly hostile to Plaintiffs. Plaintiffs

claim that based on STTOP and the Right to Life of Michigan's ideological goals, its presence would seriously delay the adjudication and resolution of the matter since other issues would be raised by STTOP. Because the Attorney General has fully litigated the constitutional issue before the Court, permissive intervention will not be allowed in this case.

Plaintiffs do not oppose participation by STTOP as *amicus curiae*. The Court considers STTOP and Fleser and Robinson's papers filed as *amici* briefs.[1] Although STTOP seeks additional time to file a brief in opposition to Plaintiffs' Motion for Preliminary Injunction, because the Court has denied STTOP's Motion to Intervene as a party in this case and the parties have agreed to consolidate the preliminary injunction hearing with a hearing on the merits of the case, any additional briefs on the Motion for Preliminary Injunction are not required.

V. CONCLUSION

The Court declares that the Michigan statute, known as the Legal Birth Definition Act, M.C.L. § 333.1081 et seq., is unconstitutional. As more fully set forth above, the Act places an undue burden on the woman's right to reproductive choice, fails to contain language protecting the health of the pregnant woman, contains a life exception language which is constitutionally inadequate and includes language which is unconstitutionally vague.

Accordingly,

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[1] On May 17, 2005, Plaintiffs submitted a Notice of Filing attaching a brochure by the Right to Life of Michigan, "You're Being Robbed." This is to support Plaintiffs' claim that STTOP, a part of the Right to Life of Michigan, is essentially a fund-raising organization. In response, STTOP opposes the "Notice" stating it is untimely filed and not pertinent. It is noted that the brochure had no bearing on the Court's analysis regarding the intervention motion.

IT IS ORDERED that Defendants' Motion to Dismiss **(Docket No. 19, filed April 11, 2005)** is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for an Order to Consolidate Hearing on Motion for Preliminary Injunction with a Final Hearing on the Merits **(Docket No. 37, filed June 2, 2005)** is GRANTED, as agreed to by the parties at the hearing.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Preliminary Injunction **(Docket No. 3, filed March 1, 2005)** is MOOT, the Court having ruled on the merits of the case.

IT IS FURTHER ORDERED that STTOP's Motion to Intervene **(Docket No. 10, filed March 16, 2005)** is DENIED; however, the papers filed are received as *amici curae* briefs.

IT IS FURTHER ORDERED that Fleser and Robinson's Motion to Intervene as *amici* **(Docket No. 42, filed June 2, 1005)** as to any papers already filed is GRANTED.

IT IS FURTHER ORDERED that STTOP's Motion to File Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction **(Docket No. 45, filed June 16, 2005)** is DENIED.

/s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

DATED: September 12, 2005

STATE OF MICHIGAN
MIKE COX, ATTORNEY GENERAL

LEGAL BIRTH DEFINITION ACT: Application of Legal Birth Definition Act to abortion procedures

STATUTES:

PHYSICIANS AND SURGEONS:

PROSECUTORS:

The Legal Birth Definition Act, MCL 333.1081 *et seq,* which defines when a person shall be considered born for all purposes under the law, has the effect of banning, with certain exceptions, those dilation and extraction (D & X) abortion procedures that require the killing of a "perinate" as defined in the act. The Legal Birth Definition Act does not have the effect of banning the dilation and evacuation (D & E) abortion procedure.

A physician or physician's agent is immune from criminal, civil, or administrative liability for performing a dilation and extraction (D & X) abortion procedure when, in the "physician's reasonable medical judgment and in compliance with the applicable standard of practice and care," it is necessary to protect the life or health of the mother as set forth in section 3(2) of the Legal Birth Definition Act, MCL 333.1083(2).

Prosecuting attorneys are directed to employ the interpretation of the Legal Birth Definition Act contained in this opinion.

Opinion No. 7174

April 4, 2005
Honorable Cameron Brown
State Senator
The Capitol
Lansing, MI 48909

On behalf of the Hillsdale County Prosecuting Attorney, you have asked two questions regarding the application of the Legal Birth Definition Act (LBDA), MCL 333.1081 *et seq*, to the performance of abortion procedures. You ask: (1) whether the LBDA bans partial-birth abortions and any other abortion procedures; and (2) whether there are circumstances under which application of the LBDA will not result in criminal or other liability.

When interpreting the language of a statute, the primary goal is to give effect to the Legislature's intent. *Wayne County v Hathcock*, 471 Mich 445, 456; 684 NW2d 765 (2004). "[I]t is a well-established rule of statutory construction that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation." *Pulver v Dundee*, 445 Mich 68, 75; 515 NW2d 728 (1994). See also *Attorney General v Detroit United Railway*, 210 Mich 227, 256; 177 NW2d 726 (1920) ("We must presume that in framing legislation the legislature acts with a just appreciation and at least with a cursory knowledge of the constitutional limitations within which it may function"). A statute is "presumed to be constitutional unless its unconstitutionality is *clearly* apparent." *McDougal v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999) (emphasis added), citing *People v Bricker*, 389 Mich 524, 528; 208 NW2d 172 (1973).

With respect to statutes that regulate and prohibit abortion procedures, the Michigan Supreme Court has expressly required that such laws be read in a manner that preserves their constitutionality. *Bricker*, 389 Mich at 528-529. See also *People v Higuera*, 244 Mich App 429, 434; 625 NW2d 444 (2001). In *Bricker*, the Michigan Supreme Court had its first occasion to examine Michigan's criminal abortion statute, MCL 750.14[1], after

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[1] MCL 750.14 states:

> Administering drugs, etc., with intent to procure miscarriage–Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the

the United States Supreme Court's decisions in *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973), and *Doe v Bolton*, 410 US 179; 93 S Ct 739; 35 L Ed 2d 201 (1973). The *Bricker* Court held that under the *Roe* decision, Michigan's criminal abortion statute "cannot stand as relating to abortions in the first trimester of a pregnancy as authorized by the woman's attending physician in the exercise of his medical judgment." *Bricker*, 389 Mich at 527. In evaluating whether Michigan's abortion statute could nevertheless be applied to non-physicians, the Court explained that its role is to preserve the Michigan abortion law to the extent possible:

> *We are duty bound under the Michigan Constitution to preserve the laws of this state and to that end to construe them if we can so that they conform to Federal and state constitutional requirements.* The United States Supreme Court would be the first to acknowledge that our construction of our statutes in a manner which does not offend the Federal constitutional right recognized in *Roe* and *Doe* is determinative until changed by the Michigan Legislature or the initiative of the people of this state. [*Bricker*, 389 Mich at 528; emphasis added.]

The Court reiterated the principle that Michigan law requires a constitutional construction of a statute, even if its reach might otherwise extend to unconstitutional applications, as long as it may be validly applied without defeating the statute's general purpose:

> miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.
>
> In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

> "A legislative act may be entirely valid as to some classes of cases, and clearly void as to others.
>
> * * *
>
> In any such case the unconstitutional law must operate as far as it can . . . . If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others." [*Bricker*, 389 Mich at 530, quoting Cooley, Constitutional Limitations (5th ed), pp 215-216.]

Employing this principle, the Court affirmed the conviction of a non-physician who performed an abortion, construing MCL 750.14 to "mean that the prohibition of this section shall not apply to 'miscarriages' authorized by a pregnant woman's attending physician in the exercise of his medical judgment; the effectuation of the decision to abort is also left to the physician's judgment: however, a physician may not cause a miscarriage after viability except where necessary, in his medical judgment, to preserve the life or health of the mother." *Id.*, at 529-530.

More recently, in *Higuera,* the Court of Appeals employed this same approach in sustaining the constitutionality of MCL 750.14 as applied where there were allegations that a doctor performed an abortion on a 28-week-old fetus without a medical reason for doing so. *Higuera,* 244 Mich App at 433. The Court explained that, for legislation enacted after *Roe* and *Doe,* Michigan courts examine such statutes with the understanding that the Legislature seeks to prohibit only those abortions that are not constitutionally protected:

> After *Bricker* was decided in 1973, the Legislature enacted various statutes regulating the performance of abortions . . . but did not revise MCL 750.14 . . . .
>
> * * *
>
> We think it clear that in enacting those statutes after *Bricker, the Legislature intended to regulate those abortions permitted by Roe and Doe, and Bricker, and did not intend to repeal the general prohibition of abortions to the extent permitted by the federal constitution*, as construed by the United States Supreme Court. [*Higuera,* 244 Mich App at 436-437; emphasis added.]

In short, the courts give effect to the Legislature's intent in abortion cases but in a manner that strives to conform abortion statutes to constitutional requirements.

Applying these principles, the LBDA[2] defines when a person shall be considered "legally born" for the purposes of Michigan law. MCL 333.1083 and MCL 333.1085. The term "perinate" is defined in section 5(d):

> "Perinate" means a live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of

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[2] The language at issue here was originally passed by the Legislature as Enrolled Senate Bill 395 but was vetoed by the Governor on October 10, 2003. Following the veto, the legislation was proposed by initiative petition pursuant to Const 1963, art 2, § 9 and subsequently approved by a majority vote of both the Michigan House of Representatives and Senate on June 9, 2004, and became 2004 PA 135. The new act was to take effect on March 30, 2005, the 91st day after the *sine die* adjournment of the 2004 session of the Legislature. Const 1963, art 4, § 27. Its enforcement has been stayed until June 15, 2005, in the pending case of *Northland Family Planning Clinic, Inc v Attorney General*, US District Court (ED Mich) Docket No. 05CV70779.

> the vaginal introitus[3] until the point of complete expulsion or extraction from the mother's body. [MCL 333.1085(d).]

Under the LBDA, when any "anatomical part"[4] of a "live"[5] human being is known to have passed the "plane of the vaginal introitus," the human being, or "perinate," gains the protection of the law as "a legally born person for all purposes under the law." MCL 333.1083(1). While the statute does not by its own terms ban any type of abortion procedure, the practical effect of the LBDA on abortion procedures is that any physician who performs an abortion that results in the injury or death of a "perinate" would be subject to criminal prosecution. The LBDA makes a specific exception for "performing any procedure that results in injury or death of a perinate while completing the delivery" that in the "physician's reasonable medical judgment and in compliance with the applicable standard of practice and care" is necessary to "save the life of the mother" or to "avert an imminent threat to the physical health of the mother." MCL 333.1083(2)(b)(i) and (ii).

Before analyzing the statutory language, it is necessary to look at the applicable constitutional law because the Legislature is presumed to enact legislation consistent with such principles.

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[3] "Introitus" is defined in Stedman's on-line medical dictionary as "[t]he entrance into a canal or hollow organ, as the vagina." http://216.251.232.159/scmdweb/internetsomd/ASP/1529851.asp.

[4] The statute defines an "[a]natomical part" as any "portion of the anatomy of a human being that has not been severed from the body, but not including the umbilical cord or placenta." MCL 333.1085(a).

[5] The statute defines "[l]ive" as when the perinate demonstrates 1 or more of the following biological functions:

> (i) A detectable heartbeat.
>
> (ii) Evidence of breathing.
>
> (iii) Evidence of spontaneous movement.
>
> (iv) Umbilical cord pulsation. [MCL 333.1085(c).]

Pulver, supra; Detroit United Railway, supra; Bricker, supra; Higuera, supra. Recently, the United States Supreme Court ruled that a Nebraska statute that prohibited certain abortion procedures placed an undue burden on a woman's federal abortion rights by limiting the "dilation and evacuation" form of abortion, known as the D & E abortion procedure. The Court concluded that the D & E procedure was a constitutionally protected practice. *Stenberg v Carhart,* 530 US 914, 938-939; 120 S Ct 2597; 147 L Ed 2d 743 (2000).

Applying *Carhart,* the United States Court of Appeals for the Sixth Circuit upheld an Ohio statute that prohibited only the "dilation and extraction" abortion procedure, known as the D & X abortion procedure, and not the D & E procedure. See *Women's Medical Professional Corp v Taft,* 353 F3d 436 (CA 6, 2003). See also *Carhart,* 530 US at 951 (O'Connor, J., concurring, stated that "a ban on partial-birth abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view"). In examining the Ohio statute in light of *Carhart,* the Sixth Circuit provided definitions of both the D & E procedure and the D & X procedure:

> **Dilation and Evacuation (D & E) procedure:**
>
> As performed late in the second trimester, the abortion procedure commonly referred to as dilation and evacuation, or "D & E," begins with dilation of a woman's cervix. Once sufficient dilation is achieved, the physician reaches into the woman's uterus with an instrument, grasps an extremity of the fetus, and pulls. When the fetus lodges in the cervix, the traction between the grasping instrument and the cervix causes dismemberment and eventual death, although death may occur prior to dismemberment. The process continues until the entire dead fetus has been removed, piece-by-piece, from the woman's uterus. [*Taft,* 353 F3d at 439; citations omitted.]

Dilation and Extraction (D & X) procedure:

> The physician initiates the D & X or partial birth abortion procedure by dilating a woman's cervix, but to a greater degree than in the traditional D & E procedure. Once the physician achieves sufficient dilation, the manner in which the abortion proceeds depends upon the presentation of the fetus. . . . In a breech extraction [where the fetus presents in a feet first position], the physician partially delivers the fetus through the mother's cervix up to a point that allows the physician to access the fetus's head, which is inside the mother, while stabilizing the fetus's body, which is outside the mother. Then, in order to collapse the fetus's skull (so that it will pass easily through the cervix), the physician forces a pair of scissors into the base of the skull, enlarges the opening and evacuates the contents with a suction catheter. The abortion concludes with the removal, in a single pass, of the fetus's intact, dead body. If the fetus presents head first (a cephalic presentation), the doctor first collapses the fetus's exposed skull by breaching and compressing the [head] with the forceps' jaws, inserting a finger . . . , or piercing the [head] with a sharp instrument, such as a tenaculum or a large-bore needle. The doctor then suctions out the fetus's skull contents, if necessary, and completes the delivery of the fetus from the mother's body, whole and intact, in a single pass. [*Taft*, 353 F3d at 439-440; citations and quotation marks omitted.]

As the Sixth Circuit noted, these terms "have a generally understood meaning, regularly relied upon by courts, litigants, medical experts, and legislatures operating in this field of law." *Taft*, 353 F3d at 439. In upholding the constitutionality of the

Ohio statute, the Sixth Circuit was also clear that, under *Carhart,* the D & E procedure is protected by the federal constitution.

Significantly, the Sixth Circuit emphasized that "courts have explained repeatedly that the principal distinction between D & X and D & E is *intactness*: D & X maximizes intactness and D & E requires dismemberment prior to removal of the fetus." *Taft,* 353 F3d at 452 (emphasis in original), citing *Carhart,* 530 US at 927, 939 and *Women's Medical Professional Corp v Voinovich,* 130 F3d 187, 199 (CA 6, 1997).

With this understanding of the federal constitutional rules, the Michigan Legislature enacted the LBDA in 2004. In order to determine which abortion procedures are subject to criminal prosecution as a result of passage of the LBDA, the question then is which abortion procedure requires the injury or death of a perinate. Therefore, the crucial statutory language is found in the provision defining the term "perinate" and related terms.

Given the established definitions of the D & X and D & E procedures described in *Taft* and *Carhart* and the prevailing constitutional principles, Michigan's LBDA prohibits the D & X procedure only. The definition of "perinate" spans the period from the time an "anatomical part" of a live and intact fetus passes beyond the plane of the vaginal introitus to the time the perinate is completely expelled or extracted from the mother's body. MCL 333.1083(2).

As explained in *Carhart* and *Taft,* the D & E procedure requires dismemberment or disarticulation of the fetus and removal of the dead fetus "piece-by-piece" from the woman's uterus – there is no intact extraction of the fetus. Consequently, in a D & E procedure as described by *Taft* and *Carhart*, the fetus would never achieve the status of a perinate under the statute. The statute specifically excludes from its definition of "anatomical part" a part of the fetus that has been "severed from the [fetus's] body." MCL 333.1085(a). In contrast, the D & X procedure, as previously defined, involves the partial extraction of a live and intact fetus for the sole purpose of intentionally

killing it, which under the LBDA would be the killing of a "perinate." The LBDA cannot be read, however, to place any restrictions on actions taken before an anatomical part of an intact, live fetus passes beyond the plane of the vaginal introitus of the mother's body.

This reading of the LBDA is consistent with the legislative history of the statute. The statute was known as an effort to ban "partial-birth abortions," which is the common term used for the D & X procedure. See Senate Fiscal Agency Analysis, SB 395, October 10, 2003, pp 2-5, 6. See also *Carhart,* 530 US at 942 ("'partial birth abortion,' [is] a term ordinarily associated with the D & X procedure"). The arguments advanced in support of the statute were unambiguous in targeting the D & X procedure:

> [T]he bill [SB 395] effectively would prohibit the practice of partial-birth abortion. . . . *Partial-birth abortion is a gruesome procedure whereby a nearly full-term fetus is partially delivered and then killed by means of having its skull crushed or incised before the delivery is completed.* . . . This extreme practice should not be tolerated in a civilized society and violators should be punished appropriately. While the bill does not refer to partial-birth abortion by name, it specifies that a perinate would be considered a legally born person for all purposes under the law. [Senate Fiscal Agency Analysis, SB 395, October 10, 2003, p 6; emphasis added.]

This description corresponds to the definition of the D & X procedure in *Taft,* 353 F3d at 439-440, and *Carhart,* 530 US at 927-928.

Moreover, interpreting the LBDA as prohibiting D & X procedures that require the killing of a perinate, and not the D & E procedure, is consistent with the rule requiring that statutes be accorded the presumption of constitutionality. See *McDougal,*

461 Mich at 24 (a statute is "presumed to be constitutional unless its unconstitutionality is clearly apparent"). In fact, given the Michigan Supreme Court's decision in *Bricker,* this interpretation of the statute is compelled. See *Bricker,* 389 Mich at 528-530. In the context of the LBDA, current federal case law is clear that the only abortion procedure that Michigan may prohibit is the D & X procedure that requires the killing of a perinate. See *Carhart, supra; Taft, supra.*

Any application of the statute to constitutionally protected methods of abortion, such as the D & E procedure, is void under *Bricker.* Michigan law cannot constitutionally limit the D & E abortion procedure. *Carhart, supra*; *Taft, supra*. See also *Bricker*, 389 Mich at 528-530. Therefore, the LBDA can have no application where an "anatomical part" of a live and intact fetus passes beyond the plane of the vaginal introitus during a constitutionally protected method of abortion such as the D & E abortion procedure.[6]

It is my opinion, therefore, in answer to your first question, that the Legal Birth Definition Act, MCL 333.1081 *et seq,* which defines when a person shall be considered born for all purposes under the law, has the effect of banning, with certain exceptions, those dilation and extraction (D & X) abortion procedures that require the killing of a "perinate" as defined in the act. The Legal Birth Definition Act does not have the effect of banning the dilation and evacuation (D & E) abortion procedure.

Your second question asks whether there are circumstances under which application of the LBDA will not result in criminal or other liability. Section 3 of the statute

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[6] In all other cases, whether abortion-related or not, the LBDA would only apply to actions taken after a fetus has achieved the status of a "perinate" as defined by the statute. For example, the LBDA would not apply to the killing of a fetus where the fetus presents head first and no "anatomical part" of the intact, live fetus has passed beyond the plane of the vaginal introitus.

provides that a physician or agent of a physician[7] is immune from "criminal, civil, or administrative liability for performing any procedure that results in injury or death of a perinate while completing the delivery of the perinate" under any of the following circumstances:

> (a) If the perinate is being expelled from the mother's body as a result of a spontaneous abortion.
>
> (b) If in that physician's reasonable medical judgment and in compliance with the applicable standard of practice and care, the procedure was necessary in either of the following circumstances:
>
> > (i) To save the life of the mother and every reasonable effort was made to preserve the life of both the mother and the perinate.
> >
> > (ii) To avert an imminent threat to the physical health of the mother, and any harm to the perinate was incidental to treating the mother and not a known or intended result of the procedure performed. [MCL 333.1083(2)(a) and (b).]

The phrase "imminent threat to the physical health" is defined to mean "a physical condition that if left untreated would result in substantial and irreversible impairment of a major bodily function." MCL 333.1085(b).

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[7] As used in this opinion, "agent" means "an individual performing an act, task, or function under the delegatory authority of a physician." MCL 333.1083(2).

The Sixth Circuit in the *Taft* case upheld the constitutionality of the Ohio statute, which contained an exception based on "reasonable medical judgment." *Taft*, 353 F3d at 445. The provisions of the Ohio criminal code at issue in *Taft* stated:

> [N]o person shall knowingly perform a partial birth procedure on a pregnant woman when the procedure is not necessary, in reasonable medical judgment, to preserve the life or health of the mother as a result of the mother's life or health being endangered by a serious risk of the *substantial and irreversible impairment of a major bodily function*. [*Taft*, 353 F3d at 440, citing Ohio Rev. Code Ann. § 2919.15.1(B), (C); emphasis added.]

The Sixth Circuit concluded that "Ohio's maternal health exception is valid because it permits the partial birth procedure when necessary to prevent significant health risks. The Fourteenth Amendment, as applied in [*Planned Parenthood v Casey*, 505 US 833; 112 S Ct 2791; 120 L Ed 2d 674 (1992)] and *Carhart*, requires nothing more." *Taft*, 353 F3d at 445.

The immunity provisions contained in the LBDA are like the Ohio statute in many significant respects. Under the LBDA, the decision determining whether the procedure is necessary is based on the "reasonable medical judgment" of the physician performing the procedure. MCL 333.1083(b). The physician's decision must also be "in compliance with the applicable standard of practice and care." MCL 333.1083(b). In the words of the Supreme Court in *Carhart*, a physician under the LBDA does not have "unfettered discretion" in the selection of abortion methods; rather there is a health exception where "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Carhart, supra*, 530 US at 938. The LBDA also defines "[i]mminent threat to the physical health" of the mother as a physical condition that if left untreated would result in "substantial and irreversible impairment of a major bodily

function." MCL 333.1085(b). This is almost identical to the language upheld as constitutional in the Ohio statute. See *Taft, supra.*

The primary difference between the Michigan and Ohio statutes arises from the physician's obligation in Michigan to preserve the life of the perinate and to avoid intentionally harming the perinate when attempting to preserve the life or health of the mother. The LBDA immunizes a physician from criminal, civil, or administrative liability for performing a procedure that results in injury or death to a perinate while completing the delivery of the perinate to save the life of the mother or to avert an imminent threat to the mother. MCL 333.1083(2). The LBDA provides immunity in the following two circumstances: (1) in attempting to save the life of the mother, the physician must make "every reasonable effort . . . to preserve the life of both the mother and the perinate;" or (2) in attempting to avert an imminent threat to the mother's health, any harm to the perinate must be "incidental to treating the mother and not a known or intended result of the procedure performed." MCL 333.1083(2)(b).

Where the physician concludes that the mother's life or health makes it medically necessary to perform an act that will injure or kill the perinate, the physician must first consider other reasonably safe alternatives, if any, before doing so. MCL 333.1083(2)(b)(i) and (ii). In other words, the physician must look to ensure the life or physical health of the mother without harming the perinate where medically possible. These considerations do not, however, prevent a physician from performing a procedure that may directly harm or kill the perinate where in the reasonable medical judgment of the physician it is necessary to safeguard the mother's life or health. See *Carhart, supra; Taft, supra.*

It is my opinion, therefore, in answer to your second question, that a physician or physician's agent is immune from criminal, civil, or administrative liability for performing a dilation and extraction (D & X) abortion procedure when in the

"physician's reasonable medical judgment and in compliance with the applicable standard of practice and care," it is necessary to protect the life or health of the mother as set forth in section 3(2) of the Legal Birth Definition Act, MCL 333.1083(2).

As Michigan's Attorney General, it is my duty to supervise and advise all prosecuting attorneys and to take the necessary actions to protect the interests of the people of the State. MCL 14.30. See also MCL 14.28.[8] The questions presented in your letter on behalf of the Hillsdale County Prosecuting Attorney involve matters of great importance that affect the interests of the people of the State of Michigan. As proclaimed by the people who proposed this act by initiative petition and by the Legislature, the State "has a compelling interest in protecting the life of a born person." MCL 333.1082(d). There is currently pending before the federal courts a case challenging the constitutionality of the Legal Birth Definition Act. Further, the people of the State have an interest in assuring that there will be a uniform and fair application of this act throughout the State of Michigan. Persons may reasonably and in good faith rely on the advice contained in this opinion; pursuant to fundamental rules of due process, they are protected from prosecution. See *People v Woods*, 241 Mich App 545, 557; 616 NW2d 211 (2000).[9] Therefore, in order to protect the interests of the people, consistent with my authority under MCL 14.30, I direct all prosecuting attorneys to employ the

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[8] See Letter Opinion of the Attorney General to Representative D. J. Jacobetti, dated May 1, 1979, p 2. In his letter, former Attorney General Frank Kelley explained that "[w]hen advising State agencies and prosecutors, I consider such advice as binding whether in letter form or in the form of an opinion to be published." See also *Traverse City School Dist v Attorney General*, 384 Mich 390, 410, n 2; 185 NW2d 9 (1971).

[9] This bar to prosecution is based on the criminal doctrine of entrapment by estoppel. "To determine the availability of the defense, the court must conclude that (1) a government must have announced that the charged criminal act was legal; (2) the defendant relied on the government announcement; (3) the defendant's reliance was reasonable; and (4) given the defendant's reliance, the prosecution would be unfair." *United States v Levin*, 973 F2d 463, 468 (CA 6, 1992).

interpretation of the Legal Birth Definition Act contained in this opinion.

MIKE COX
Attorney General

Legal Birth Definition Act

MCL 333.1081

Sec. 1. This act shall be known and may be cited as the "legal birth definition act".

MCL 333.1082

Sec. 2. The following findings are hereby made:

(a) That in Roe v Wade the United States supreme court declared that an unborn child is not a person as understood and protected by the constitution, but any born child is a legal person with full constitutional and legal rights.

(b) That in Roe v Wade the United States supreme court made no effort to define birth or place any restrictions on the states in defining when a human being is considered born for legal purposes.

(c) That, when any portion of a human being has been vaginally delivered outside his or her mother's body, that portion of the body can only be described as born and the state has a rational basis for defining that human being as born and as a legal person.

(d) That the state has a compelling interest in protecting the life of a born person.

MCL 333.1083

Sec. 3. (1) A perinate shall be considered a legally born person for all purposes under the law.

(2) A physician or an individual performing an act, task, or function under the delegatory authority of a physician is immune from criminal, civil, or administrativ liability for performing any procedure that results in injury or death of a perinate while completing the delivery of the perinate under any of the following circumstances:

(a) If the perinate is being expelled from the mother's body as a result of a spontaneous abortion.

(b) If in that physician's reasonable medical judgment and in compliance with the applicable standard of practice and care, the procedure was necessary in either of the following circumstances:

(i) to save the life of the mother and every reasonable effort was made to preserve the life of both the mother and the perinate.

(ii) To avert an imminent threat to the physical health of the mother, and any harm to the perinate was incidental to treating the mother and not a known or intended result of the procedure performed.

MCL 333.1084

Sec. 4. Nothing in this act shall abrogate any existing right, privilege, or protection under criminal or civil law that applies to an embryo or fetus.

MCL 333.1085

Sec. 5. As used in this act:

(a) "Anatomical part" means any portion of the anatomy of a human being that has not been severed from the body, but not including the umbilical cord or placenta.

(b) "Imminent threat to the physical health" means a physical condition that if left untreated would result in substantial and irreversible impairment of a major bodily function.

(c) "Live" means demonstrating 1 or more of the following biological functions:

(i) A detectable heartbeat.

(ii) Evidence of breathing.

(iii) Evidence of spontaneous movement.

(iv) Umbilical cord pulsation.

(d) "Perinate" means a live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus until the point of complete expulsion or extraction from the mother's body.

(e) "Physician" means an individual licensed by the state to engage in the practice of medicine or osteopathic medicine and surgery under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.